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United States Court of Appeals

EIGHTH CIRCUIT

No. 15,547
Civil

UNITED STATES OF AMERICA, Appellant

vs.

LATROBE CONSTRUCTION COMPANY,
BRAGG'S ELECTRIC CONSTRUCTION COMPANY
ARKANSAS FOUNDRY COMPANY
GENERAL STEEL PRODUCTS COMPANY
JEFFERY LUMBER COMPANY
PADGETT LUMBER COMPANY
CHOCTAW, INC.
IRA SHERRILL
MILL AND MINE SUPPLY COMPANY
CROW-BURLINGAME COMPANY

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

United States Court of Appeals

EIGHTH CIRCUIT

No. 15,547
Civil

UNITED STATES OF AMERICA, Appellant

vs.

LATROBE CONSTRUCTION COMPANY,
BRAGG'S ELECTRIC CONSTRUCTION COMPANY
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JEFFERY LUMBER COMPANY
PADGETT LUMBER COMPANY
CHOCTAW, INC.
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MILL AND MINE SUPPLY COMPANY
CROW-BURLINGAME COMPANY

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

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(Filed in U. S. District Court January 8, 1954)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

Civil No. B-238

UNITED STATES OF AMERICA

v.

WESTMORELAND MANGANESE CORPORATION;
M. F. HIGHSMITH, President of
Westmoreland Manganese Corporation;
E. B. Blough, Treasurer of
Westmoreland Manganese Corporation;
W. H. Specht, Secretary of
Westmoreland Manganese Corporation;
STATE OF ARKANSAS, by Joe R. Cash,
Commissioner of Labor;
TRANSALL, INC.;
WESTINGHOUSE ELECTRIC SUPPLY CO.;
KOPPERS COMPANY, INC.;
TRANS WORLD AIRLINES, INC.;
CONTINENTAL GIN COMPANY;
GARDNER-DENVER CORPORATION;
IRA C. SHERRILL;
PADGETT LUMBER COMPANY;
MILL AND MINE SUPPLY COMPANY;
ARKANSAS FOUNDRY COMPANY;
JEFFERY LUMBER COMPANY;
LATROBE CONSTRUCTION COMPANY;
GENERAL STEEL PRODUCTS COMPANY;
CROW-BURLINGAME CO.;
BRAGG'S ELECTRIC CONSTRUCTION COMPANY;
CHOCTAW, INC.;
CARNEGIE INSTITUTE OF TECHNOLOGY;
and CENTRAL SCIENTIFIC COMPANY.

COMPLAINT

Comes the plaintiff, United States of America, by Osro Cobb, United States Attorney for the Eastern District of Arkansas, at the direction and by the authority of the Attorney General, and for its complaint alleges:

I

That the actions on behalf of the plaintiff, insofar as they deal with the making of the loan agreement and the execution of other contractual obligations hereinafter referred to, were taken by the Defense Materials Procurement Agency, an instrumentality of the United States government, pursuant to the Defense Production Act of 1950, Act of September 8, 1950, 64 Stat. 798, 50 U.S.C.A., App. Section 2061 *et seq.*; that the said Defense Materials Procurement Agency was abolished by Executive Order No. 10480 on August 14, 1953, and the functions, duties, and responsibilities of the said agency insofar as they pertain to this cause of action, have been transferred to, and assumed and performed by, the Administrator of General Services, for and on behalf of the General Services Administration, an agency and instrumentality of the United States government, since that date. The defendant Westmoreland Manganese Corporation is a corporation organized and existing under the laws of the State of Maryland and qualified to do business, and doing business, in the State of Arkansas; that, according to the filings made by said defendant corporation in the office of the Secretary of State for the State of Arkansas, Pulaski County has been designated as the county of the Corporation's Arkansas domicile; that the *de facto* Arkansas domicile of the said defendant Corporation is in Independence County; that the resident address of the said defendant Corporation is Batesville, Arkansas. That the defendant, M. F. Highsmith, Batesville, Arkansas, is the President of the defendant Westmoreland Manganese Corporation; that the defendant E. B. Blough, 566 Vine Street, Johnstown, Pennsylvania, is the Treasurer of the defendant Westmoreland Manganese Corporation; that the defendant, W. H. Specht, 917 Park Building, Pittsburgh, Pennsylvania, is the Secre-

tary of the defendant Westmoreland Manganese Corporation. That all other defendants named herein are either judgment creditors of the defendant Westmoreland Manganese Corporation or creditors of the said corporation holding laborers' and/or materialmen's liens, or persons, corporations, or associations which have actions pending against the defendant Westmoreland Manganese Corporation. The Court has jurisdiction of this action by virtue of Section 1345, Title 28, United States Code, and Section 2156(b), Title 50 App., United States Code.

II

That on or about the 7th day of April 1952, the Defense Materials Procurement Ageney, acting for and in behalf of the United States of America, and the defendant Westmoreland Manganese Corporation, entered into a contract, bearing the order number "GS-OOP(D)-12263", pursuant to which the United States of America agreed to purchase certain quantities of manganese ore, conforming to certain qualitative specifications from the defendant Westmoreland Manganese Corporation, at an agreed unit price, and Westmoreland Manganese Corporation agreed to produce for, and sell to, the United States of America the said ore in the quantities, according to the quality, and at the price specified. Westmoreland Manganese Corporation also agreed to begin production at the earliest possible date and that, commencing not later than the 7th day of April, 1953, production was to be at a certain average rate per month. By the terms of this contract, the defendant Westmoreland Manganese Corporation further agreed to produce the manganese ore from ore deposits owned by it and located near Cushman, Arkansas. The defendant further agreed to proceed without delay to install a washing and concentrating plant of a certain capacity, to construct necessary roads, to procure required mining and hauling equipment and, generally, to do all things necessary to meet its production obligations under the contract. For the purpose of assisting Westmoreland Manganese Corporation in the installation and construction work beforementioned, the United States of America agreed to ad-

vance sums of money in a total amount not to exceed $3,807,250.00, said advances to bear interest at the rate of 4% per annum from the date of advance and to be payable on or before January 1, 1960. Said loan was to be upon, and subject to, certain enumerated terms and conditions, among which was the provision that "upon expiration of the term of this contract, or upon prior termination of the contract, such portion of the advance payments made under the contract as have not been repaid to the government, together with accrued interest thereon, shall be immediately due and payable" (Paragraph 5(k), page 8). Funds were advanced to the defendant Westmoreland Manganese Corporation pursuant to this agreement, as more particularly set out hereinafter. A copy of said contract is attached hereto, marked Exhibit A, and made a part hereof, the original being held subject to the inspection of the parties in interest and to the orders of this Court. Said contract shall sometimes hereinafter be referred to as the "Original Letter Contract".

III

That on or about the 22nd day of May, 1952, and in pursuance of the terms of the Original Letter Contract mentioned in the last paragraph of this complaint, the defendant Westmoreland Manganese Corporation, for value received, executed its promissory "Mortgage Note" in the principal sum of Three Million Eight Hundred Seven Thousand Two Hundred Fifty Dollars and No Cents ($3,807,250.00) payable on or before January 1, 1960, with interest on the unpaid principal (computed from the date of each advance) at the rate of Four Per Cent (4%) per annum, and delivered said note to the United States of America. Said note was expressly made subject to all of the provisions of the Original Letter Contract "and any amendments thereto". Said note was also made subject to the provisions of a certain Real Estate and Chattel Mortgage and a certain Supplemental Mortgage (both of which shall be referred to in later paragraphs of this complaint) with regard to the rights of the payee thereof and the terms and conditions upon which the indebtedness represented by the said note was secured by the said mort-

gages. Said note lastly provided that the unpaid principal and interest could be declared, or become, due "on the conditions, in the manner, at the time or times, and with the effect set forth in the said mortgage, and supplement thereto, or in said letter agreement or in any agreement hereafter executed for the purpose of superseding said Letter Agreement". A copy of said Mortgage Note is attached hereto, marked Exhibit B, and made a part hereof as if set out word for word herein, the original being held subject to the inspection of the parties in interest and to the Orders of this Court.

IV

That contemporaneously with the execution of the note described above and of even date therewith, the defendant Westmoreland Manganese Corporation executed and delivered a "Real Estate and Chattel Mortgage" in favor of the United States of America as mortgagee for the purpose of securing the full and prompt payment of the said note, or any advances made thereunder, said Real Estate and Chattel Mortgage covering and mortgaging the following real and personal property, to-wit:

(Land description omitted)

E. Furniture, fixtures, machinery and equipment described as follows:

(1) Existing items of furniture, fixtures, machinery and equipment as follows:

One Caterpillar D8 Tractor, Serial No. 2U12575 equipped with 8A Bulldozer and No. 25 Cable Control 9D17134

One Willys No. 1274 Jeep

Three Gasoline-powered hoisters; 6 wheelbarrows; 9 mining tubs; 750 feet 2" black steel pipe; small two-wheel trailer;

Two sample Splitters

Weigh scales, loading ramp and miscellaneous loading equipment at Pfeiffer, Arkansas, including

5 gasoline hoists, 5 winfllass beams and 375 feet of steel cable.

Office Equipment:

10 Chairs

4 Desks

1 Typing Stand

3 Desk Lamps

1 Electric Fan

1 Typewriter

1 Steel file cabinet

(2) Furniture, fixtures, machinery, and equipment and all other personal property hereafter acquired by Mortgagor, together with all and singular the parts of and accessories to all said property, whether now belonging thereto or hereafter added thereto by way of renewal, replacement or otherwise.

F. Any and all property, real, personal or mixed or rights to property hereafter acquired by Mortgagor, including the special bank account or accounts established by Mortgagor pursuant to the agreement of April 7, 1952, between Mortgagee and Mortgagor and any amendment thereto.

Said mortgage provided, among other things, that it should constitute a first lien on the mortgaged property; that it was given to secure all amounts advanced which might become due and owing to the United States of America pursuant to the Original Letter Contract of April 7, 1952, or any amendment thereof; that mortgagor would pay all taxes and assessments and insure the insurable properties against loss due to fire, floods, windstorms, tornadoes, cyclones or other casualties usually insured against; that in case of any default in payment or performance according to any agreement contained in the note or the mortgage, or if the mortgagor should fail or refuse to perform any of the terms of the Original Letter Contract, or any amendment thereof, (page 16 of Real Estate and Chattel

Mortgage) which default, or failure or refusal by the mortgagor should continue unremedied for a period of sixty (60) days after receipt of notice from mortgagee to mortgagor specifying such default, failure or refusal, then and in that event the mortgagee could, at its option, declare the entire indebtedness immediately due and payable and that mortgagor would allow mortgagee to inspect at any reasonable time mortgagor's records pertaining to the mortgaged property. Said mortgage was properly acknowledged before a notary public in the manner prescribed by law as shown by the Acknowledgment attached thereto and one counterpart thereof filed in the Office of the Circuit Clerk and Ex-Officio Recorder for Independence County, Arkansas, on the 22nd day of May, 1952, and therein recorded in Record Book S-4 at pages 5-15 of the records of Deeds of Trust; another counterpart of said mortgage was filed in the office of the Circuit Clerk and Ex-Officio Recorder for Izard County, Arkansas, on the 22nd day of May, 1952, and therein recorded in Record Book . at page ; another counterpart of said mortgage was filed (not to be recorded) as a chattel encumbrance in the office of the Circuit Clerk of Independence County, Arkansas, on the 22nd day of May, 1952, and is now on file in said office; the last counterpart of said mortgage was filed (not to be recorded) as a chattel encumbrance in the office of the Circuit Clerk of Pulaski County, Arkansas, on the 23rd day of May, 1952, and is now on file in that office. A copy of said Real Estate and Chattel Mortgage is attached hereto, marked Exhibit C and made a part hereof, the original being held subject to the inspection of the parties in interest and to the orders of this Court.

V

That contemporaneously with the execution of the Real Estate and Chattel Mortgage mentioned above, and of even date therewith, defendant Westmoreland Manganese Corporation executed and delivered a Supplemental Mortgage in favor of the United States of America as Mortgagee for the purpose of securing the full and prompt paymnet of the Mortgagee Note mentioned above, or any ad-

vances made thereunder, but more particularly for the purpose of supplementing the provisions of the said Real Estate and Chattel Mortgage by making more explicit the description of certain properties encumbered by the said former mortgage. Said Supplemental Mortgage covers and mortgages the following property, to-wit:

(A) The manganese washing and concentrating plant now owned by Mortgagor and located in Independence County, Arkansas, approximately seven miles from the town of Cushman, together with all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, sidings, switch tracks and all other machinery, equipment and personal property (including office equipment and automotive equipment) now or at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect.

(B) The manganese washing and concentrating plant (of an estimated daily capacity of six thousand long tons) which is to be constructed by Mortgagor and located in Independence County, Arkansas, approximately seven miles from the town of Cushman, at or near the site of the present plant mentioned in (A) aforesaid, together with all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, slime pond facilities, sidings, switch tracks and all other machinery, equipment and personal property (including office equipment and automotive equipment) at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect.

(C) All other machinery, equipment and personal property (whether similar or dissimilar to any of the foregoing), wherever located, now owned by Mortgagor or at any time hereafter acquired by it.

(D) All land, and interests therein, located in Independence County, Arkansas, or in Izard County, Arkansas,

or in any other county within the State of Arkansas (and regardless of whether the same may or may not be specifically described in the above mentioned Real Estate and Chattel Mortgage) now owned by Mortgagor or at any time hereafter acquired by it.

(E) All interests in minerals located in, under or upon lands in Independence County, Arkansas, Izard County, Arkansas, or any other county in the State of Arkansas (the term "interests" including leasehold interests, mining and exploration rights, or the absolute ownership of minerals *in situ*), now owned by Mortgagor, regardless of whether the same may or may not be specifically described in said Real Estate and Chattel Mortgage, and all such interests at any time hereafter acquired by it.

(F) All easements, rights-of-way, franchises and privileges now owned by Mortgagor or at any time hereafter acquired by it.

(G) All ores and ore products at any time owned by the Mortgagor, whether produced from lands mined by Mortgagor or otherwise; including particularly all manganese ores produced through Mortgagor's operations.

Said Supplemental Mortgage, among other things, stated the understanding of the parties that advances under the loan were to be used for the construction of the proposed manganese washing and concentrating plant and that the lien of the mortgage would take priority over the lien of any mechanic, materialman or laborer or any other statutory lien. In said Supplemental Mortgage, the defendant Westmoreland Manganese Corporation waived all right of redemption under the Act of May 8, 1899, appearing as Section 51-1111 (this waiver being in addition to the waivers of like character contained in the aboveemen tioned Real Estate and Chattel Mortgage). Said Supplemental Mortgage was properly acknowledged before a notary public in the manner prescribed by law as shown by the Acknowledgment attached thereto, and one counterpart thereof was filed in the office of the Circuit Clerk & Ex-Officio Recorder for Independence County, Arkansas,

on the 22nd day of May, 1952, and therein recorded in Record Book S-4 at pages 5-15 of the records of Deeds of Trust; another counterpart of said mortgage was filed in the office of the Circuit Clerk & Ex-Officio Recorder for Izard County, Arkansas, on the 22nd day of May, 1952, and therein recorded in Record Book at page ; another counterpart of said Supplemental Mortgage was filed (not to be recorded) as a chattel encumbrance in the office of the Circuit Clerk of Independence County, Arkansas, on the 22nd day of May, 1952, and is now on file in that office; the last counterpart of said Supplemental Mortgage was filed (not to be recorded) as a chattel encumbrance in the office of the Circuit Clerk of Pulaski County, Arkansas, on the 23rd day of May, 1952, and is now on file in that office. A copy of said Supplemental Mortgage is attached hereto marked Exhibit D, and made a part hereof, the original being held subject to the inspection of parties in interest and the orders of this Court.

VI

That on or about the 21st day of January, 1953, the United States of America executed and delivered a Release of Part of Mortgaged Premises in favor of the defendant Westmoreland Manganese Corporation, which instrument released from the lien created by the mortgages mentioned in the last two paragraphs of this complaint the following property, situate in Independence County, State of Arkansas, to-wit:

> Part of the Southeast Quarter ($SE^1/_4$) of the Northwest Quarter ($NW^1/_4$) of Section 3, Township 14 North, Range 7 West, more particularly described as follows: Starting at the Southeast corner of the Southeast Quarter ($SE^1/_4$) of the Northwest Quarter ($NW^1/_4$) of Section 3, Township 14 North, Range 7 West; thence North along the quarter section line 59 feet to the center line of the transmission line right of way; thence North 37 degrees 50 minutes West along the center line of the transmission line 705 feet to the point of Beginning: Beginning at said point, thence South 52 degrees 10 minutes West

250 feet; thence North 37 degrees 50 minutes West 375 feet to the center of the County Road; thence North 66 degrees 35 minutes East along the center line of the Road 361.4 feet; thence South 37 degrees 50 minutes East 285 feet; thence South 52 degrees 10 minutes West 100 feet to the point of Beginning, containing 2.65 acres, more or less.

A copy of this Release of Part of Mortgaged Premises is attached hereto, marked Exhibit E and made a part hereof. On or about the 26th day of January, 1953, the defendant Westmoreland Manganese Corporation executed and delivered a Quitclaim Deed in favor of the Arkansas Power and Light Company covering the property described in this paragraph. A copy of this Quitclaim Deed is attached hereto, marked Exhibit F, and made a part hereof as if set out word for word herein.

VII

Subsequent to the date of the Real Estate and Chattel Mortgage and Supplemental Mortgage heretofore referred to, defendant Westmoreland Manganese Corporation received certain interests in certain real property, which interests are encumbered under the after-acquired property provisions of the said mortgage instruments, to-wit:

A. On or about the 13th day of January, 1953, P. G. Shook and W. H. Neal, Trustees for Shook & Fletcher Supply Company, a corporation, and Sloss-Sheffield steel and Iron Company, a corporation, executed and delivered a Right-of-Way Deed to defendant Westmoreland Manganese Corporation granting an easement to a strip of land 100 feet wide over, upon, and across the following described land:

The Southeast Quarter of the NW^1_4, Section 36, Township 15 North, Range 7 West, Independence County, Arkansas.

Said Right-of-Way Deed is recorded in Book Q-6, pages 29-31 of the Records of Deeds, Independence County, Arkansas.

B. On or about the 15th day of January, 1953, E. J. Baxter and Ella Baxter granted an easement over a part of the S½ of the NE¼ and the N½ of the SE¼ of Section 36, Township 15 North, Range 7 West, as more particularly described in Book Q-6, page 51, Records of Deeds, Independence County, Arkansas. This Complaint will be amended to include an accurate description of this property as soon as said description is secured by the plaintiff.

C. On or about the 13th day of August, 1952, S. L. McDaniel and Essie McDaniel, his wife, conveyed to the defendant Westmoreland Manganese Corporation by warranty deed the following described property:

> All that part of the NE¼ of the NW¼, Section 31, Township 15 North, Range 6 West, lying South of Cushman-Sandtown-Cave City Road, Independence County, Arkansas,

said deed being filed for record on the 24th day of October, 1952, and being recorded in Book L-6, page 157, Deed Records, Independence County, Arkansas.

D. On an unspecified day in September, 1952, S. L. McDaniel and Essie McDaniel, his wife, conveyed to the defendant Westmoreland Manganese Corporation by warranty deed the following described property:

> A 5-acre tract of land in the shape of a square in the NE corner of the NW¼ of the NW fractional ¼, Section 31, Township 15 North, Range 6 West; this being the same tract of land which was reserved to the grantor in a deed to grantee dated December 14, 1951, and recorded in Book O-6, page 163, Deed Records of Independence County, Arkansas.

This warranty deed was filed on the 24th day of October, 1952, and recorded in Book R-6, page 159, Deed Records, Independence County, Arkansas.

VIII

That on the 2nd day of April, 1953, it had become apparent that the defendant Westmoreland Manganese Corporation would be unable to complete the facilities and to

begin production of manganese ore within the time provided in said Original Letter Agreement and would therefore be in default, and that said default would constitute a breach of said contract. That on or about the date abovementioned, the United States of America, acting by and through the Defense Materials Procurement Agency, and the Westmoreland Manganese Corporation entered into and executed an agreement entitled "Amendment No. 1 to Letter Order No. GS-OOP(D)-12263", (this Letter Order also being referred to herein as the Original Letter Contract), whereby the defendant Westmoreland Manganese Corporation agreed to place the facilities on a temporary stand-by basis and to preserve the facilities from the elements, theft, and damage, and the United States of America agreed to make further advances for this purpose. The said Amendment No. 1 also provided, among other things, that the United States of America would make further advances to enable Westmoreland Manganese Corporation to meet certain of its outstanding accrued obligations. That pursuant to said Amendment No. 1, the plaintiff, acting through the Defense Materials Procurement Agency, made advances after April 2, 1953, for the purposes outlined in said Amendment. Said Amendment further provided:

> "3. Notwithstanding any provision in the Contract to the contrary, the Contractor hereby grants to the Government the unqualified right and privilege of terminating the Contract at any time in the future up to commencement of production upon determination by the Government that termination of the Contract is in the best interest of the Government; the Contractor shall take no legal action to prevent such termination of the Contract by the Government, and disclaims any and all recourse by reason of such termination by the Government.
>
> 4. Under the terms of a mortgage instrument made by the Contractor to the Government on May 22, 1952, pursuant to the terms of the Contract, it is provided that the Contractor shall have sixty (60) days from notice to remedy the Contractor's failure

or refusal to perform any covenant, agreement or condition in the Contract, note or mortgage as a condition precedent to foreclosure. Contractor hereby waives the sixty-day period granted by said mortgage within which to remedy the breach, and agrees that henceforth all moratorium provisions contained in said mortgage shall be without force and effect, and in the event of termination of the Contract as provided in paragraph 3 hereof, the Contractor shall, on demand of the Government, grant the Government immediate possession of the facilities, with the right to use the facilities in place or off-site, either directly or by contract, and the Government may lease and dispose of such facilities, provided, however, that nothing herein contained shall prejudice or impair the right of the Contractor to an accounting. Contractor shall, at the request of the Government, execute, deliver and record a supplemental mortgage under the terms of which the aforesaid sixty-day moratorium provisions shall be deleted from the original recorded mortgage."

A copy of said Amendment No. 1 is hereto attached, marked Exhibit G and made a part hereof, the original being held subject to the inspection of the parties at interest and to the orders of this Court.

IX

A. That certain defendants claim an interest in the mortgaged property, or certain portions thereof, based on judgments which they have against defendant Westmoreland Manganese Corporation, as follows:

1. Defendant Joe R. Cash, Commissioner of Labor, acting for and on behalf of the State of Arkansas, by virtue of a Certificate of Assessment filed on the 16th day of September, 1953, and abstracted in Judgment Record Book "H", page 50, of the Circuit and Chancery Court Records of Independence County, Arkansas.

2. Defendant Transall, Inc., by virtue of a judgment rendered by the Circuit Court, Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Transall, Inc., Plaintiff* v. *Westmoreland Manganese Corporation, Defendant*, for the sum of Four Thousand Four Hundred Ninety-Nine Dollars and Six Cents ($4,499.06), plus costs in the amount of Twelve Dollars and Fifty-Five Cents ($12.55), which judgment is abstracted in Judgment Record Book "H" at page 52, and recorded in Book "V", page 232, of the Circuit Court Records of Independence County, Arkansas.

3. Defendant Westinghouse Electric Supply Company, by virtue of a judgment rendered by the Circuit Court, Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Westinghouse Electric Supply Company, Plaintiff* v. *Westmoreland Manganese Corporation, Defendant*, for the sum of One Thousand Seven Hundred Eighty-Four Dollars and Three Cents ($1,784.03), plus costs in the amount of Eight Dollars and Fifty-Five Cents ($8.55), which judgment is abstracted in Judgment Record Book "H", page 52, and recorded in Book "V", page 234, of the Circuit Court Records of Independence County, Arkansas.

4. Defendant Koppers Company, Inc., by virtue of a judgment rendered by the Circuit Court, Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Koppers Company, Inc., Plaintiff* v. *Westmoreland Manganese Corporation, Defendant*, for the sum of Four Hundred Thirty-Four Dollars and Twenty-Two Cents ($434.22), plus costs in the amount of Eight Dollars and Seventy Cents ($8.70), which judgment is abstracted in Judgment Record Book "H", page 53, and recorded in Book "V" at page 231, of the Circuit Court Records of Independence County, Arkansas.

5. Defendant Trans World Airlines, Inc., by virtue of a judgment rendered by the Circuit Court,

Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Trans World Airlines, Inc., Plaintiff* v. *Westmoreland Manganese Corporation, Defendant*, for the sum of Seven Hundred Thirty-Eight Dollars and Eighty-One Cents ($738.81), plus costs in the amount of Seven Dollars and Twenty-Five Cents ($7.25), which judgment is abstracted in Judgment Record Book "H", page 53, and recorded in Book "V", page 233, of the Circuit Court Records of Independence County, Arkansas.

6. Defendant Continental Gin Company, by virtue of a judgment rendered by the Circuit Court, Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Continental Gin Company, Plaintiff* (Birmingham 2, Alabama) v. *Westmoreland Manganese Corporation, Defendant*, for the sum of Forty Thousand Seven Hundred Twenty-Seven Dollars and Seventy-Six Cents ($40,727.76), plus costs in the amount of Twelve Dollars and Eighty-Five Cents ($12.85), which judgment is abstractsd in Judgment Record Book "H", page 530, and recorded in Book "V", page 231, of the Circuit Court Records of Independence County, Arkansas.

7. Defendant Gardner-Denver Corp., by virtue of a judgment rendered by the Circuit Court, Independence County, Arkansas, on the 26th day of October, 1953, in case styled *Gardner-Denver Corp.* v. *Westmoreland Manganese Corporation*, for the sum of Four Hundred Fifty-Eight Dollars and No Cents ($458.00) plus costs in an unknown amount, which judgment is abstracted in Judgment Record Book "H", at page 55, and recorded in Book "V", at page 243, of the Circuit Court Records of Independence County, Arkansas.

B. That certain defendants claim some interest in the mortgaged property, or certain portions thereof, based on mechanic's and or materialmen's liens filed against the

defendant Westmoreland Manganese Corporation, as follows:

1. Defendant Ira B. Sherrill, by virtue of a materialmen's lien filed on the 9th day of April, 1953, and amendment thereto filed on the 6th day of May, 1953, in the amount of Three Hundred Sixty-Two Dollars and Fifty Cents ($362.50);

2. Defendant Padgett Lumber Co., by virtue of a materialmen's lien filed on the 17th day of April, 1953, and amendment thereto filed on the 6th day of May, 1953, in an amount unknown to plaintiff.

3. Defendant Mill & Mine Supply Co., by virtue of a materialmen's lien filed on the 24th day of April, 1953, in the amount of Eight Thousand Three Hundred Twelve Dollars and Sixty-Nine Cents ($8,312.69);

4. Defendant Arkansas Foundry Company, by virtue of a materialmen's lien filed on a date unknown to plaintiff in the amount of Forty-Nine Thousand Two Hundred Sixty-Seven Dollars and Ninety-Six Cents ($49,267.96);

5. Defendant Jeffery Lumber Company, by virtue of a materialmen's lien filed on the 4th day of May, 1953, in the amount of Two Thousand One Hundred Fifty-Seven Dollars and Fifty-Five Cents ($2,157.55);

6. Defendant Latrobe Construction Company, by virtue of a labor and materialmen's lien filed on the 9th day of May, 1953, in the amount of Three Hundred Fourteen Thousand Four Hundred Seventy-One Dollars and Thirty-Three Cents ($314,471.33);

7. Defendant General Steel Products Company by virtue of a materialmen's lien filed on the 25th day of May, 1953, in the amount of Fifteen Thousand Nine Hundred Twenty-Five Dollars and Sixty-Two Cents ($15,925.62);

8. Defendant Crow-Burlingame Company by virtue of a materialmen's lien filed on the first day of June, 1953, in the amount of Four Thousand Three Hundred Sixty-Six Dollars and Twelve Cents ($4,366.12);

9. Defendant Bragg's Electric Construction Co., by virtue of a labor and materialmen's lien filed on the 2nd day of June, 1953, in the amount of Fifteen Thousand Seven Hundred Dollars and Thirteen Cents ($15,700.13);

10. Defendant Choctaw, Inc., by virtue of a materialmen's lien filed on the 8th day of August, 1953, in the amount of Three Thousand Eighty-Six Dollars and Twenty-Nine Cents ($3,086.29);

C. That certain defendants herein may be asserting some claim to the mortgaged property, or portions thereof, by virtue of certain suits which they have commenced against the defendant Westmoreland Manganese Corporation, which actions are now pending, as follows:

1. Defendant Carnegie Institute of Technology filed a complaint on the 23rd day of November, 1953, in the Circuit Court of Independence County, Arkansas in an action styled *Carnegie Institute of Technology* v. *Westmoreland Manganese Corporation*;

2. Defendant Central Scientific Company filed a complaint on the 24th day of November, 1953, in an action styled *Central Scientific Company, a Corporation* v. *Westmoreland Manganese Corporation* in the Municipal Court of Batesville, Arkansas.

All rights of the defendants named in sub-paragraphs A, B, and C of this paragraph IX in and to the property mortgaged to the plaintiff are subsequent, inferior, and subordinate to the rights of the United States of America under the Real Estate and Chattel Mortgage and the Supplemental Mortgage mentioned hereinabove.

X

That plaintiff's demand for permission to take an inventory has been refused by the defendant Westmoreland Manganese Corporation, and the plaintiff is without information necessary to describe accurately all of the property acquired by the defendant since the date of the execution of the beforementioned Real Estate and Chattel Mortgage and the beforementioned Supplemental Mortgage, which after-acquired property is as much a part of the security under said mortgages as the property specifically described therein, and which property it is the purpose of this action to foreclose, in addition to the said particularly described property. This complaint will be amended to include all of said after-acquired property by specific description as soon as plaintiff has secured an inventory of said properties.

XI

Pursuant to the provisions of paragraph 3 of Amendment No. 1 to Letter Order No. GS-OOP(D)-12263, and subsequent to the execution of said Amendment and prior to the commencement of production of manganese ore, the plaintiff determined that a termination of the contract was in the best interest of the government, terminated same, and on or about the 29th day of October, 1953, notified the defendant Westmoreland Manganese Corporation of the said termination. The advances made under the contract in the amounts hereinafter set out had not been repaid to the government at the date of said termination and immediately became due and payable. The defendant Westmoreland Manganese Corporation has not paid said advancements or any part thereof, and said advancements (with the interest accrued thereon) are now due, payable, and owing to the plaintiff herein, the maturity thereof having been accelerated by reason of the termination of said contract.

XII

That on or about the 6th day of January, 1954, the United States of America, plaintiff herein, made further demand upon the defendant Westmoreland Manganese

Corporation for payment of all amounts advanced pursuant to the Mortgage Note and other instruments heretofore set out, together with the interest due thereon, although said demand was not necessary because of the financial condition of said defendant. Said demand for payment was refused and denied by Mr. H. F. Highsmith, President of defendant Westmoreland Manganese Corporation, acting for and on behalf of said defendant corporation.

XIII

That pursuant to the Original Letter Contract, Amendment No. 1 thereto and the Mortgage Note executed by the defendant Westmoreland Manganese Corporation, the plaintiff has advanced as of the date of this complaint the principal sum of Two Million Eight Hundred Seventy-Six Thousand Four Hundred Ninety-Eight Dollars and Seventy-One Cents ($2,876,498.71) and interest has accrued thereon as of the date of this complaint in the amount of One Hundred Fifty-Nine Thousand Six Hundred Thirty-Five Dollars and Seven Cents ($159,635.07), on which interest accumulates daily at the rate of Three Hundred Fifteen Dollars and Twenty-Three Cents ($315.23). No payment of either principal or interest has been made by the defendant Westmoreland Manganese Corporation on this indebtedness, and the total amount is now due and payable to the plaintfif.

XIV

That among the personal property belonging to the defendant Westmoreland Manganese Corporation, and upon which the plaintiff herein has a lien by virtue of the instruments pleaded hereinabove, are many pieces of machinery and equipment having a value of several hundred thousand dollars; that the defendant Westmoreland Manganese Corporation has failed and refused, and still fails and refuses, and is financially unable, to employ standard methods for the preservation of the mortgaged facilities and properties from the elements, theft, and damage, and said machinery and equipment, and the improvements and facilities are deteriorating and suffering extensive damage; that unless immediate possession of the

said facilities, improvements, machinery, and equipment is transferred to a receiver appointed by this Court, said facilities, improvements, machinery, and equipment will further deteriorate and be further damaged; that certain of the aforementioned properties are in danger of being lost, removed, and/or materially injured; that the defendant Westmoreland Manganese Corporation has permitted judgments to be taken against it and liens to accrue in sums exceeding several hundred thousand dallars, and there are now filed against said defendant other claims in substantial amounts; that said defendant is insolvent and unable to respond in damages to the plaintiff for its failure to preserve the mortgaged facilities; that the property covered by the mortgages foreclosed upon herein is insufficient to pay the judgment to which the plaintiff is entitled and that the defendant Westmoreland Manganese Corporation bas no funds to pay any deficiency assessed against it, and therefore the government will suffer irreparable damage unless said Receiver is appointed by this Court; that, as pleaded above, it is necessary that an inventory be taken of the assets and properties belonging to the defendant Westmoreland Manganese Corporation for the purpose of providing information upon which an accurate description of the property intended to be foreclosed hereby can be based and that it will be necessary for this Court to appoint a Receiver to make the said inventory and to ascertain the date and terms of acquisition of all after-acquired property, to preserve and maintain all of the property of the defendant located in Arkansas and or covered by the mortgages hereinabove referred to, pending the final determination of this action on its merits.

Wherefore, plaintiff prays judgment against the defendant, Westmoreland Manganese Corporation, in the sum of $2,876,498.71 as principal, and in the sum of $159,635.07 as interest, computed through the 7th day of January, 1954, together with interest on the aforementioned principal at the rate of 4% per annum from the said 7th day of January, 1954, until date of the judgment rendered herein; with interest on the total amount of said judgment from the date of said judgment at the rate of 6% per annum until paid; and for any additional sums

which plaintiff may be forced to pay to protect its security, pending final decree; that said judgment be decreed to be a first, prior and paramount lien on the land and personal property encumbered by the Real Estate and Chattel Mortgage and the Supplemental Mortgage beforementioned; and that if the said judgment be not paid within a reasonable time, to be fixed by this Court, a Commissioner be appointed to sell said real and personal property to satisfy said judgment; that the purchaser at any sale of said property be decreed to have the right to immediate possession of said lands and property, with the rents and profits therefrom, from the date of said sale; that all right and equity of redemption of the defendants, and each of them, be foreclosed and forever barred; that a Receiver Pendente Lite be appointed to immediately take charge and possession of said properties, to manage, conserve and protect same, to pay all taxes and insurance, to make all necessary repairs and carry on all necessary maintenance, to bring into his possession all properties mortgaged to the plaintiff, and to, generally, hold the said properties subject to the orders of this Court, pending final determination of this cause on its merits; for all costs herein expended and for all other proper relief to which plaintiff is entitled, either in law or in equity.

UNITED STATES OF AMERICA

/s/ OSRO COBB
United States Attorney

/s/ G. THOMAS EISELE
Assistant United States Attorney

DEFENSE MATERIALS PROCUREMENT AGENCY

EXHIBIT A

WASHINGTON 25, D. C.

April 7, 1952
GS-OOP(D)-12263

Westmoreland Manganese Corporation
Batesville, Arkansas.

Gentlemen:

1. The United States of America, acting through the Defense Materials Procurement Agency (hereinafter re-

ferred to as the "Government"), proposes to enter into a formal contract with you which will provide for the production and disposition by you of 264,000 long dry tons of manganese ore estimated to contain 12,000,000 long ton units of manganese conforming to National Stockpile Specification P-30, latest revision as of the date hereof. As used herein, a long ton unit of manganese means 22.4 pounds of manganese. You shall begin such production as soon as possible and commencing not later than twelve (12) months from the date of your acceptance of this order such production shall be at an average rate of 2,000 long dry tons per month during the first four months of operation, and continue thereafter at an average rate of 47,250 long dry tons per year. For the purpose of this order, production shall be deemed to have commenced with the first twenty-four hour day on which 1,000 long wet tons of mine-run ore are processed through the washing and concentrating plant, which you will provide in accordance with paragraph 2 hereof.

2. The ore to be mined hereunder shall be produced from ore deposits owned by you, located near Cushman, Arkansas, which you estimate contain recoverable ore in excess of 600,000 long dry tons, averaging forty-six percent (46%) manganese. Upon your acceptance of this order you will proceed without delay with the development, equipment, and preparation of the above-named property for the production of manganese ore at the rate required to meet your obligations hereunder, including but not restricted to the installation of a washing and concentrating plant of 6,000 long tons per day capacity, the construction of necessary roads, the procurement of required mining and hauling equipment, and necessary related facilities for the production and processing of manganese ore, and you will make such contracts and commitments for supplies and services as are necessary therefor. In addition, if and when the slime pond presently proposed to be used for the deposit of clay and other waste material from the milling operation is found to be inadequate to contain the waste material produced during the terms of this agreement, you will construct a second slime pond, and provide pumping

and other necessary facilities therefor (such project being hereinafter referred to as the "second slime pond"), the cost of which is estimated to be not in excess of $155,000, and the capacity of the second slime pond to be only that necessary to store the waste material estimated to be produced during that portion of the contract term for which there is no capacity for storage remaining in the first slime pond. If you elect to construct such second slime pond, at a cost which exceeds $155,000, or with a capacity greater than that needed for the purpose indicated, the additional funds necessary for such construction shall be provided by you from sources other than those specified in paragraph 5 hereafter. All of the property and equipment described in this paragraph 2 shall hereinafter be referred to as the "facilities". The mine-run ore from your aforesaid ore deposits will be used by you, as produced, in the production of the manganese ore called for herein.

3. (a) All of the manganese ore produced hereunder, up to but not in excess of 264,000 long dry tons, shall be sold to and purchased by the Government.

(b) You will notify the Government not later than the tenth day of each month as to the estimated quantity of ore to be delivered to the Government during the succeeding month. All manganese ore purchased by the Government hereunder shall be delivered f.o.b. railroad cars Cushman, Arkansas. With respect to such deliveries, you shall without any charge to the Government act as forwarding agent and make all shipments in accordance with instructions to be furnished by the Government.

4. The prices per long ton unit of manganese (hereinafter referred to as "unit") contained in the manganese ore sold to the Government hereunder and delivered f.o.b. railroad cars at Cushman, Arkansas, shall be as follows:

(a) During the first four months of production hereunder or until 8,000 long tons of manganese ore are produced, whichever occurs earlier, for Types I and III ore, more particularly described in National Stockpile Specification P-30, referred to in paragraph 1 hereof, $1.72 per unit, and for Type II, $1.67 per unit.

(b) During the next succeeding six (6) months' period, for Type I and Type III ore, $1.42 per unit, and for Type II, $1.37 per unit.

(c) During the next succeeding twelve (12) months' period, the price per unit shall be as provided in subparagraphs (b) and (c) hereof, adjusted by that amount which represents the difference between the presently estimated total operating costs, per unit, as set forth below, (including administration and other overhead costs, but excluding interest, depreciation, State and local taxes) and the total average actual operating costs per unit for such items incurred during the six (6) months' period referred to in subparagraph (b) hereof, such total average actual operating costs shall be determined by an independent certified public accountant after audit as provided in paragraph 8 (b) hereof. Such adjusted unit price shall be maintained without change, except as otherwise provided in subparagraphs (f) and (g) hereof, during this twelve (12) months' period; provided, however, that if the total average actual operating costs per unit during said six (6) months' period are lower than the presently estimated total operating costs per unit, the price per unit shall be reduced during said twelve (12) months' period by seventy-five percent (75%) of the difference. For the purpose of this subparagraph (c) the presently estimated operating costs per unit are as follows:

Stripping	$0.166
Mining	0.141
Hauling	0.313
Milling	0.190
Drilling	0.022
Road Maintenance	0.017
Administrative and Overhead	0.041
Total	$0.890

In determining the actual cost of operation during the six (6) month and twelve (12) month periods specified hereinabove, salaries of corporate officers, as such, aggregating in excess of $10,000 per year will not be included.

(d) Thereafter, and for the duration of the balance of the contract, the price per unit shall be as provided in subparagraphs (b) and (c) hereof, adjusted by that amount which represents the difference between the presently estimated total operating costs per unit, as set forth below, (including administration and other overhead costs, but excluding interest, depreciation, State and local taxes) and the total average actual operating costs per unit for such items incurred during the twelve (12) months' period referred to in subparagraph (c) hereof, such total average actual operating costs shall be determined by an independent certified public accountant after audit as provided in paragraph 8 (b) hereof. Such adjusted unit price shall be maintained without change, except as otherwise provided in subparagraphs (f), (g) and (i) hereof, during the balance of this contract, provided, however, that if the total average actual operating costs per unit during said twelve (12) month period are lower than the presently estimated total operating costs per unit, the price per unit shall be reduced during the balance of this contract by seventy-five percent (75%) of the difference. For the purpose of this subparagraph (d) the presently estimated operating costs per unit are as follows:

Stripping	$0.166
Mining	0.141
Hauling	0.313
Milling	0.190
Drilling	0.022
Road Maintenance	0.017
Administrative and Overhead	0.041
Total	$0.890

(e) The unit prices specified in subparagraphs (a) and (b) hereof are based upon the present estimate that the net effect of the premiums and penalties provided in subparagraph (f) hereafter will be to reduce the average price paid by the Government by $0.063 per unit. Effective for the periods specified in subparagraphs (c) and (d) above, the price per unit, as provided in subparagraph (b) above, will be adjusted to reflect the difference between

the actual average premium and penalties adjustment per unit for the six (6) months' period specified in subparagraph (b) above, and $0.063 per unit.

(f) As applied to each delivery made to the Government hereunder, the prices per unit specified in this paragraph 4 hereof shall be increased or decreased as the case may be, in accordance with the following premiums and penalties, fractions *pro rata*:

Premiums:

(i) Manganese content above 46 percent (dry basis); ½ cent for each 1.0 percent;

(ii) Iron content below 6.0 percent (dry basis): ½ cent for each 1.0 percent.

Penalties:

(i) Manganese content below 46 percent (dry basis): 1 cent for each 1.0 percent down to and incuding 42.0 percent; below 42.0 percent, 4 cents plus 1½ cents for each 1.0 percent down to 40.0 percent minimum.

(ii) Iron content above 6.0 percent (dry basis): 1 cent for each 1.0 percent up to and including 8.0 percent; above 8 percent: 2 cents plus ¾ cent for each 1 percent up to 16 percent maximum;

(iii) Silica plus alumina content above 11.0 percent (dry basis): 1 cent for each 1.0 percent up to 15.0 percent maximum;

(iv) Phosphorus content above 0.12 percent (dry basis): 1 3 cent for each 0.01 percent up to 0.3 percent maximum.

(g) In the event that the second slime pond is required to be constructed, and that in accordance with the provisions of paragraph 5 hereafter, an advance payment is requested with respect thereto, as compensation for the additional capital and operating costs incident to the construction of such second slime pond, the price per unit for manganese ore produced hereunder after such pond is placed in operation shall be increased by an amount per

unit to be agreed upon between the parties as reasonably reflecting the additional capital, interest thereon and operating costs per unit incurred therefor. Agreement as to such increase in price shall be subject to such additional terms and conditions relating to the construction and financing of said second slime pond as may be agreed upon by the parties, and shall be a condition precedent to the granting of such advance by the Government. The increase in price per unit resulting from such agreement shall be retained by the Government for all sales made to it hereunder and immediately applied to the repayment of all advances, together with accrued interest thereon, made under this contract until such time as the amount so retained equals the amount of the advance granted for the construction of said second slime pond, plus accrued interest.

(h) If the average concentration ratio of mill feed to manganese ore produced by your washing and concentrating plant during the six (6) months' period specified in paragraph 4 (b) hereof, shall fall below four percent (4%), the Government will reimburse you at the rate of $1,150 for each 0.01 percent (0.01%), fractions *pro rata*, that such average ratio during said period shall fall below four percent (4%) down to and including three percent (3%), provided, however, that in no event shall the obligation of the Government pursuant to this subparagraph exceed $115,000. Similarly, if the average ratio during said period exceeds four percent (4%), the Government shall retain, from moneys otherwise due you, $1,150 for each 0.01 percent (0.01%), fractions *pro rata*, that such average ratio exceeds four percent (4%) provided, however, that in no event shall such retention exceed $115,000.

(i) The average direct operating cost per unit of manganese for (a) direct labor and (b) other direct costs, during the twelve-month period referred to in subparagraph (c) hereof, shall be determined at the end of such period.

"Direct Labor" is defined as non-supervisory productive labor engaged in mining, hauling and milling of mine-run ore.

"Other Direct Costs" is defined as and limited to fuel, lubricants, power, repair parts and miscellaneous operating supplies.

"Base Month" is defined as the month during which the end of the above twelve-month period occurs.

The costs per unit for "direct labor" and "other direct costs", determined as above, will be adjusted as of the the end of March, June, September and December of each year thereafter, beginning with the end of the quarter which first occurs 45 days or more after the end of the twelve-month period. The basis for the adjustment will be the costs per unit determined as above, multiplied by:

(1) Direct Labor—the percentage of change from the base month to the last month of the quarter in the Index of Average Hourly Earnings for the industry designated as "Metal, Mining", as published monthly by the U. S. Department of Labor, Bureau of Labor Statistics.

(2) Other Direct Costs—the percentage of change from the base month to the last month of the quarter in the Index of Wholesale Prices (1947-1949=100) for the group designated as "All Commodities Other Than Farm and Foods" as published monthly by the U. S. Department of Labor, Bureau of Labor Statistics.

The aggregate of the direct operating cost adjustments, as determined above will increase or decrease the prices per unit as adjusted under the provision of subparagraphs (d) and (e) above, applicable to deliveries made in the quarter following the next succeeding quarter; provided however, that no increase or decrease of less than one-half cent per unit will be made effective.

5. For the purpose of assisting you in the performance of your obligations hereunder, the Government will, after your acceptance of this order and upon your written request, advance to you from time to time as may be needed by you in the developing, equipping, preparation and operation of the aforesaid facilities, including working capital,

completion of the land purchase, and the acquisition and installation of new facilities, for the mining, production and processing of the ore called for hereunder, sums of money which may total but may not exceed $3,807,250 (of which sums, $155,000, shall be requested and used, if and when required, exclusively for the construction of the second slime pond, in accordance with the provisions of paragraphs 2 and 4(g) hereof), subject to the following terms and conditions:

(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilites are completed and the equipment is purchased.

(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.

(d) The Government shall have a lien paramount to all other liens upon the credit balance in the special account or accounts in which the advance payments may be deposited, upon materials produced by you from the facilities, and upon all other assets.

(e) You will purchase and maintain at your expense insurance on the facilities of such types and in such amounts as are satisfactory to the Government.

(f) Of the $3,807,250 which the Government may advance hereunder, up to $2,788,650 shall be used for the acquisition and completion of the new facilities (of which $155,000 shall be used for the construction of the second slime pond, if and when required), up to $418,600 shall be used to pay off the balance owed on mining properties and up to $600,000 shall be used for working capital requirements of the new facilities.

(g) All advance payments shall bear interest at the rate of four percent (4%) per annum on the unpaid balance from the date of the advance. Interest will accrue on the basis of a 365 (or 366) day year. The amount of each repayment will first be credited against the interest accrued to the date of payment and then against the unpaid principal. Interest on moneys advanced before the effective date of production will be added to the moneys advanced and interest thereafter will be computed on the sum thereof.

(h) So long as any part of the moneys advanced hereunder, together with accrued interest thereon, remains unpaid, the ownership and management of the corporation shall be subject to the approval of the Government and no substantial change in ownership or management, by merger or liquidation, or otherwise, will be made without the prior approval of the Government.

(i) For the purpose of repayment to the Government of funds advanced pursuant to subparagraph (g) hereof for acquisition and construction of facilities, working capital and completion of payment of obligations for land, the Government will withhold from payments otherwise due you for ore delivered to it as provided herein, the sum of $0.35 per long ton unit. If, with the consent of the Government, manganese fines are sold by you to private industry, you agree in such instances to remit directly to the Government $0.35 for each unit so sold. In addition to the foregoing, there will be withheld or remitted such additional amounts as may be provided for pursuant to the provisions of paragraph 4 (g) hereof.

(j) For each advance payment made to you hereunder you shall furnish the Government with a promissory note in form to be prescribed by the Government for the full amount of such advance, bearing interest at four percent (4%) from the date of the advance payment, payable on or before January 1, 1960.

(k) You may at any time or times, at you option, repay from any unobligated funds of the corporation the whole or any part of the Government advance, together with accrued interest thereon. Upon expiration of the term of this contract, or upon prior termination of the contract, such portion of the advance payments made under the contract as have not been repaid to the Government, together with accrued interest thereon, shall be immediately due and payable.

(l) No portion of the funds advanced hereunder, and no portion of the funds received from the sale of ore produced under the provisions of this agreement, shall be used by you for exploratory or experimental work relating to production of manganese or other products from lands owned by you and not utilized for the purpose of this contract, except such funds as may be accrued to the corporation as provided in subparagraph (m) below.

(m) Effective as of the date of the commencement of production of ore, as defined in paragraph 1 hereof, you may withdraw from net profits, after taxes, received from your operations hereunder for any corporate use, not in excess of $75,000 in any calendar year.

(n) All outstanding corporation obligations as of March 17, 1952, except those which will be liquidated through advances by the Government, are to be liquidated in full prior to any advance of funds hereunder.

6. You will make your washing and concentrating plant available and will process, upon six (6) months' written advance notice and at fair and reasonable charges to be fixed by the Government, any and all quantities of mine-run ore of types and kinds similar to those which are the subject matter of this agreement which are furnished by the

Government from ores purchased by the Government from other producers in your area throughout the term of this contract, and in a total quantity not in excess of ten percent (10%) of the mine-run ore to be processed by you to produce the quantity of manganese ore to be sold to the Government hereunder. The time allowed for the completion of this contract, as specified in paragraph 7 (a) hereof shall be extended proportionally to the ratio of the quality of mine-run ore processed for Government account to the quantity of such ore processed by you to meet the requirement of paragraph 3 (a) of this agreement, but not to exceed 10 percent (10%) of such contract time.

7. (a) Subject to the provisions of paragraphs 6 and 9 hereof, this order will terminate June 30, 1959, or upon the earlier occurrence on one of the following:

(i) the production of 264,000 long dry tons of manganese ore from the facilities described in paragraphs 1 and 2 hereof.

(ii) the expiration of six (6) years after the commencement of production, as defined in paragraph 1 hereof.

(iii) the repayment to the Government of all advances made hereunder and all interest accrued thereon.

(b) Notwithstanding the provisions of subparagraph (a) above, the obligations of the parties with respect to the disposition of such manganese ore as has been produced at the time of termination shall remain in effect until discharged in accordance with the terms hereof.

8. (a) You will maintain in accordance with generally accepted accounting principles, separate books and records of the costs of the new facilities incurred by you in connection with your obligations under the contract and the disbursement of funds advanced therefor; and of the operation of new facilities.

(b) Beginning with the effective date of production as defined in paragraph 1 hereof, you will furnish the Govern-

ment monthly cost statements broken down in a manner similar to that set forth in paragraph 4 (c) hereof, and a Profit and Loss Statement and Balance Sheet. In addition to the above monthly statements, you will furnish the Government with a Profit and Loss Statement containing detailed operating cost data and a Balance Sheet, both of which are to be prepared by an independent Certified Public Accountant after he has made a detailed audit of the records at the end of the production period specified in paragraph 4 (a) (b) and (c) hereof, and at the close of each fiscal year thereafter.

(c) The Government shall have the right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation.

(d) You shall furnish the Government from time to time such other reports as it may reasonably require, concerning your operations hereunder.

(e) Such books and records, together with supporting data, shall be retained while the contract is in effect, and for the period of three (3) years thereafter.

9. The time for performance by you of your obligations hereunder shall be extended at your option by a period equivalent to any delays, interruptions, or cessations caused by force majeure (herein defined as any cause beyond your reasonable control and not due to your fault or negligence, including without limitation, acts of God, strikes, fire, storm, sabotage, acts of war or public enemy, and priority or allocation requirements or other acts of the Federal Government). You shall give prompt notice to the Government of the occurrence of any such cause.

10. All contract provisions presently required by Federal Law, Executive Order, or applicable regulations, to be included in contracts of this type herein described, are hereby incorporated herein by reference.

11. Your acceptance of this order will be indicated by affixing your signature to this letter and two copies hereof and mailing or delivering the executed original and one executed copy to the Defense Materials Procurement Administrator within fifteen (15) days from the date of this letter. Such acceptance will constitute this order a contract on the terms set forth herein.

12. This contract is entered into pursuant to the Defense Production Act of 1950, as amended (Public Law 774, 81st Congress; Public Laws 69 and 96, 82nd Congress).

UNITED STATES OF AMERICA

Defense Materials Procurement Agency
By s Jess Larson
Defense Materials Procurement
Administrator

Accepted: April 7, 1952
WESTMORELAND MANGANESE CORPORATION
By s O. E. Sellers
Title: President
GSA-WASH DC 52-11191

EXHIBIT C

REAL ESTATE AND CHATTEL MORTGAGE

This mortgage, made by and between Westmoreland Manganese Corporation, a corporation duly organized and existing under the laws of the State of Maryland and qualified to do business in the State of Arkansas (said corporation hereinafter referred to as "Mortgagor"), and the United States of America (hereinafter referred to as the "Mortgagee").

Witnesseth

Whereas, at a special meeting of the stockholders of the Mortgagor held at the Fort Stanwix Hotel, Johnstown, Pennsylvania, on the 28th day of April, 1952, a resolution

was duly adopted by the stockholders owning 84% of the stock of the Mortgagor consenting to this mortgage, and

Whereas, at a special meeting of the Board of Directors of the Mortgagor held on the 28th day of April, 1952, it was duly resolved that this mortgage be executed by the President of the Mortgagor in the Mortgagor's name and Mortgagor's corporate seal be hereunto affixed and attested by the secretary and that this mortgage be duly acknowledged and delivered on behalf of the Mortgagor to the Mortgagee, and

Whereas, the Mortgagor has executed its certain promissory note bearing even date herewith for the principal sum of $3,807,250 payable to the order of the Mortgagee on or before January 1, 1960, with interest thereon at the rate of four percent (4%) per annum from the date of each advance;

Now, therefore, the Mortgagor hereby mortgages to Mortgagee the following:

A. Real estate situate, lying and being in the Counties of Independence and Izard, State of Arkansas, more particularly described as follows, to-wit:

[Descriptions of various tracts omitted]

B. Also real estate situate, lying and being in the Counties of Independence and Izard, State of Arkansas, more particularly described as follows, to-wit:

[Description of lands omitted]

together with all and singular the tenements, hereditaments and appurtenances belonging or in anywise appertaining to the premises above-described in A. and B., or any part thereof, and all reversions, remainders, revenues, rents, issues and profits thereof (including in the foregoing but not limited to all buildings, manufacturing plants, railroad sidings, improvements and fixtures now or hereafter located in, on or about said premises; all easements, rights of way, licenses and privileges to said premises belonging or in anywise appertaining, now or hereafter owned by the Moragagor; and all the estate, right, title, interest, prop-

erty, possession, claim and demand whatsoever, as well at law as in equity now or hereafter owned by the Mortgagor, of, in and to said premises, property and rights, and each and every part of the same, with the appurtenances), subject, however, to any and all existing easements, rights of ways, restrictive covenants, licenses, reservations of record, and grants for highway purposes.

Said premises, property and rights hereby mortgaged are hereinafter collectively sometimes called "said premises".

C. Mineral rights in real estate situate, lying and being in the Counties of Independence and Izard, State of Arkansas, more particularly described as follows, to-wit:

[Description of lands omitted]

D. Also mineral rights in real estate situate, lying and being in the Counties of Independence and Izard, State of Arkansas, more particularly described as follows, to-wit:

[Description of lands omitted]

together with all and singular all the metals, minerals, ores and ore bearing material now or hereafter owned, belonging to or claimed by the Mortgagor;

E. Furniture, fixtures, machinery and equipment described as follows:

(1) Existing items of furniture, fixtures, machinery and equipment as follows:

One Caterpillar D8 Tractor, Serial No. 2U12575 equipped with 8A Bulldozer and No. 25 Cable Control 9D17134
One Willys No. 1274 Jeep
Three Gasoline-powered hoisters; 6 wheelbarrows; 9 mining tubs; 750 feet 2" black steel pipe; small two-wheel trailer;
Two sample Splitters
Weigh scales, loading ramp and miscellaneous loading equipment at Pfeiffer, Arkansas, including 5 gasoline hoists, 5 windlass beams and 375 feet of steel cable.

Office Equipment:

10 Chairs
4 Desks
1 Typing Stand
3 Desk Lamps
1 Electric Fan
1 Typewriter
1 Steel file cabinet

(2) Furniture, fixtures, machinery and equipment and all other personal property hereafter acquired by Mortgagor, together with all and singular the parts of and accessories to all said property, whether now belonging thereto or hereafter added thereto by way of renewal, replacement or otherwise.

F. Any and all property, real, personal or mixed or rights to property hereafter acquired by Mortgagor, including the special bank account or accounts established by Mortgagor pursuant to the agreement of April 7, 1952 between Mortgagee and Mortgagor and any amendment thereto.

The personal property and chattels hereby mortgaged or intended so to be, shall be real estate for all the purposes of this mortgage and shall be had and taken to be fixtures and appurtenances to the above-described premises and, except for the hauling equipment and manganese ore, shall not be separated therefrom.

Said premises, property and rights described and referred to in the foregoing "A", "B", "C", "D", "E" and "F" are hereinafter designated as "mortgaged property".

To have and to hold the mortgaged property unto the Mortgagee and its successors and assigns, forever.

This mortgage shall constitute a first lien on the mortgaged property.

This morfgage is given to secure payment of the principal and interest at four per cent (4%) per annum of any and all amounts up to $3,807,250 and any additional amounts, which are advanced by Mortgagee to Mortgagor or which become due and owing to Mortgagee, pursuant to a letter agreement dated April 7, 1952, between Mortgagee and Mortgagor or any amendment thereof, or pursuant to the definitive contract to be entered into between the Mortgagor and Mortgagee at a subsequent date, which definitive contract shall supersede and be in substitution of the aforesaid letter agreement of April 7, 1952. The indebtedness is evidenced by a promissory note of even date herewith executed by the Mortgagor and payable January 1, 1960. The note shall be payable to Mortgagee, its assigns, or order, at the office of the Treasurer of the United States or its assigns or at the office of the Defense Materials Procurement Agency, its successors or assigns, in Washington, D. C., or at such other place as Mortgagee may from time to time appoint in writing, with interest at the rate of four per cent (4%) per annum from the date of each advance to the Mortgagor, payment of principal and interest to be made as provided in the letter agreement date April 7, 1952, between Mortgagee and Mortgagor, or any amendment thereof, or pursuant to the aforesaid definitive contract.

That Mortgagor does for itself, its successors and assigns, hereby covenant with the Mortgagee and its assigns as follows:

That Mortgagor has good and legal right to mortgage the mortgaged property; that Mortgagor will warrant and defend the title to the property described in A. above and to the mineral rights described in C. above, to Mortgagee forever against any and all claims and demands whatsoever; that Mortgagor will execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered all and every such further assurances in law as may be required for the better mortgaging unto Mortgagee all and singular the mortgaged property hereby mortgaged;

That the Mortgagor will punctually pay and discharge as the same becomes due and payable all taxes, assessments

and other governmental charges whatsoever, lawfully levied or assessed against the mortgaged property or any part thereof; and will promptly furnish the Mortgagee upon demand the receipt or receipts showing such payments; provided, however, that the Mortgagor may pay any of such taxes, assessments or governmental charges under protest or take any other appropriate steps to contest the same should it believe any such tax, assessment or governmental charge not to be due and payable; that Mortgagor shall not permit the mortgaged property or any part thereof to be sold or forfeited for any tax, assessment or governmental charge whatsoever;

That the Mortgagor will perform all such acts as will preserve and keep valid the lien and priority intended to be created by this instrument;

That, at all times during the existence of any indebtedness hereby secured, Mortgagor will keep or cause to be kept insured such of the insurable plants, buildings, machinery, equipment apparatus and real and personal property of the Mortgagor now or hereafter forming part of said mortgaged property as are usually insured by companies operating like properties against destruction or damage by fire, floods, windstorms, tornadoes, cyclones or other acts against which insurance is usually carried by companies operating like properties, all to such amount and upon such properties subject to the lien of this mortgage as may be deemed proper and reasonable by the Mortgagee; that all such insurance shall be written in insurance companies satisfactory to the Mortgagee, and the policies shall, by their terms, in form satisfactory to the Mortgagee, protect the interest of the Mortgagee in the insured property; that the Mortgagor will deliver all such policies to the Mortgagee. Should any loss occur to the insured property, the Mortgagee is hereby appointed attorney-in-fact for the Mortgagor to make proof of loss if the Mortgagor fails to do so promptly; to receipt for any sums collected under said policies, which sums or any part thereof, at the option of the Mortgagee, may be applied as the Mortgagee may determine on account of any indebtedness hereby secured or to the restoration or repair

of the property so destroyed or damaged; and, in the event that any insurance losses are paid by check, draft or other instrument payable to the Mortgagor and the Mortgagee jointly, the Mortgagee may endorse the Mortgagor's name thereon and take such further steps in behalf of the Mortgagor as are necessary to realize on such instrument. The Mortgagor promptly will give notice by mail to the Mortgagee of any loss or damage to the mortgaged property and will not adjust or settle such loss without the written consent of the Mortgagee. In the event of foreclosure of this mortgage, all right, title and interest of the Mortgagor in and to all insurance policies then in force shall pass to the purchaser at the foreclosure sale and the Mortgagee is hereby appointed attorney-in-fact for the Mortgagor to assign and transfer said policies;

That the Mortgagor will, until payment in full of all the indebtedness hereby secured use the mortgaged property in a careful and prudent manner and will maintain all buildings, improvements and other property now or hereafter forming part of said mortgaged property in constant repair and working order and in a fit condition for their proper use and occupancy, reasonable use and wear thereof excepted, provided, that, with respect to any damage resulting from any loss insured against, Mortgagor shall have no obligation to repair or replace damaged property except to the extent that the insurance proceeds for such loss shall be made available to Mortgagor by Mortgagee, and provided further, that the Mortgagor may at its option apply the insurance proceeds available to it for loss on account of such damage to the repair or replacement of the damaged property or to the acquisition, construction and installment of buildings or improvements, machinery and equipment of a different kind from those damaged or destroyed which Mortgagor deems necessary or useful in the production of manganese concentrates (such buildings, improvements, machinery and equipment to be subject to the lien of this mortgage).

That, the Mortgagor will not create or permit to accrue any debt, lien or charge on said premises or any part thereof which would be prior to or on a parity with the

lien of this mortgage; that Mortgagor will prevent any debt, lien or charge from affecting the rights of the Mortgagee, and will appear in and defend any action or proceeding arising on or subsequent to the date hereof purporting to affect the lien of this mortgage or the rights or powers of Mortgagee hereunder, and Mortgagor will pay all expenses incident thereto.

That the Mortgagor will comply with all statutes, ordinances, regulations and rules that may be established by any legally constituted public authority with respect to the use, maintenance and care of property which is the subject of this mortgage;

That (a) in case there shall be any default in the payment of any indebtedness hereby secured according to the terms of any instrument evidencing the same or any failure or non-performance of any condition, covenant or agreement contained in said notes or contained in this mortgage which default, failure or non-performance shall continue unremedied for a period of sixty (60) days after receipt of written notice from Mortgagee to Mortgagor specifying such default, failure or non-performance; or (b) in case the mortgaged property be placed under control or in custody of any court by reason of the institution of any judicial proceeding by a party other than the Mortgagee wherein a receiver of the Mortgagor or of the Mortgagor's property shall be appointed on the ground of the Mortgagor's failure to pay the Mortgagor's debts and such mortgaged property continues under such control or in such custody of the court for a period of sixty (60) days; or (c) in case a debtor's or creditor's petition filed pursuant to provisions of the Bankruptcy Act, affecting the mortgaged property be approved and the decree or order of the court approving such petition shall remain in effect for a period of sixty (60) days; or (d) in case Mortgagor abandons any of the mortgaged property and shall fail to repossess such property within sixty (60) days after receipt of written notice from Mortgagee to Mortgagor specifying such abandoned property and claiming the abandonement thereof as a default hereunder; or (e) in case Mortgagor shall fail to pay any taxes, assessments, gov-

ernmental charges, or to maintain insurance all as hereinbove provided; or (f) in case Mortgagor fails or refuses to perform any of the terms of said letter agreement dated April 7, 1952, or any amendment thereof or of the aforesaid definitive contract to be subsequently executed, and such failure or refusal remains unremedied for a period of sixty (60) days from the date of receipt by Mortgagor of a notice from Mortgagee specifying such failure or refusal; then upon the happening of any of the events referred to in (a) to (f) hereof, each of which events shall be an event of default hereunder, Mortgagee is hereby authorized and empowered, if and so long as the event or events of default in question remain unremedied, at its option, and without affecting the lien hereby created or any right of Mortgagee hereunder:

(1) to make good any such default or defaults and any money advanced by the Mortgagee for any such purpose shall be added to the principal debt and shall bear interest at the rate of four per cent (4%) per annum from the respective dates of payment, and shall be secured by the lien of this instrument and in case Mortgagee makes any such payment it shall be without prejudice to the Mortgagee's other rights hereunder; and

(2) to declare the entire indebtedness hereby secured to be immediately due and payable, and enforce any of the rights which accrue to Mortgagee hereunder and foreclose this mortgage.

That in the event that an action shall be instituted to foreclose the Mortgagor's equity of redemption, the Court shall, on application of the complainant or its attorneys in such action, appoint a receiver to take immediate possession of, manage and control said mortgaged property, notwithstanding that the same or part thereof is occupied by the Mortgagor, and to collect and receive the rents and profits thereof, and apply the same under the direction of the Court;

That no waiver by the Mortgagee of any breach of any condition, covenant or agreement herein referred to

shall be construed as a waiver of any subsequent breach of the same or any such condition, covenant or agreement;

That Mortgagee may, subject to the approval of the Mortgagor, release portions of the mortgaged property from the lien hereof without affecting the lien of this mortgage upon the mortgaged property or remainder thereof for the full amount of the indebtednes then remaining unpaid;

That this mortgage and the lien thereof shall extend to any additional premises, property and rights hereafter acquired; and that all such premises, property and rights shall forthwith upon acquisition thereof, and without further act, become subject to this mortgage and the lien thereof;

That at any and all times the Mortgagor will do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered all and every such further acts, mortgages and assurances in law as the Mortgagee shall reasonably require, for the better assuring, mortgaging, pledging and confirming unto the Mortgagee all and singular said property;

Mortgagor will allow Mortgagee to inspect at any reasonable time Mortgagor's records pertaining to the mortgaged property; and will furnish promptly and fully at any reasonable time, upon written request, certified copies of financial statements and inventory reports.

All judgments, decrees and awards for injury or damage to the mortgaged property and all awards pursuant to proceedings for condemnation thereof, as rent or otherwise and whether for a temporary taking or otherwise are hereby assigned in their entirety to Mortgagee who shall apply the same to the indebtedness secured hereby in such manner as it may elect, and Mortgagee is hereby authorized in the name of Mortgagor to execute and deliver valid acquittances for, and to appeal from any such award, judgment or decree. Settlement shall be made pursuant to any proceedings for condemnation only with the consent of Mortgagee.

That the Mortgagor will not pull down or remove any buildings, structures, fixtures, equipment, machinery, chattels and personal property now owned or hereafter acquired by Mortgagor without the permission in writing of the Mortgagee unless such pulling down or removal shall be rendered necessary by any of the said mortgaged property being worn out or injured and in such case the Mortgagor shall replace the premises or articles worn out or injured by others of at least equal value.

In case of foreclosure of this mortgage in any court of law or equity, and whether or not any order or decree shall have been entered therein, a reasonable sum shall be allowed for attorneys' fees of the plaintiff in such proceeding, and in addition thereto a reasonable sum for stenographers' fees and for all moneys expended for documentary evidence and the cost of a complete abstract of title and title report for the purpose of such foreclosure, such sums to be secured by the lien hereunder; and there shall be included in any judgment or decree foreclosing this mortgage and be paid out of said rents or the proceeds of any sale made in pursuance of any such judgment or decree: (1) all costs and expenses of such suit or suits, advertising, sale and conveyance, including attorneys' and stenographers' fees, outlays for documentary evidence and cost of complete abstract of title, and title report; (2) all moneys advanced by the Mortgagee, if any, for the purpose authorized in this mortgage, with interest as herein provided; (3) all the accrued interest remaining unpaid on the indebtedness hereby secured; (4) all the said principal money remaining unpaid. The overplus of the proceeds, if any, shall be paid to the Mortgagor on reasonable request, or as the court may direct.

That Mortgagor hereby waives, to the extent permitted by law, the benefits of all valuation, appraisement, homestead, exemption, stay, redemption and moratorium laws of the State of Arkansas, now in force or which may hereafter become laws.

That except as herein expressly provided to the contrary, no right or remedy herein conferred upon or re-

served to the Mortgagee is intended to be exclusive of any other right or remedy provided by this or any other instrument or by any applicable law including but not limited to suit or suits upon the note or notes secured hereby, but each and every such right or remedy shall be cumulative. No delay or omission by the Mortgagee in exercising any right or power accruing upon default as hereinbefore in this mortgage provided, shall impair any such right or power, or be construed to be a waiver of any such default or acquiescence therein;

That this mortgage and all the Mortgagee's rights hereunder shall remain in full force and effect notwithstanding that the Mortgagee may at any time or times, in its discretion, by action taken or by forbearance, grant, agree to or permit any extensions, renewals, modifications, waivers or indulgences whatsoever with respect to any indebtedness secured hereby, or otherwise in any manner alter the terms thereof, or take, alter or release any security for such indebtedness in addition to this mortgage, and that the Mortgagee may enforce this mortgage without resorting to any other security for such indebtedness;

Now, therefore, the condition of this mortgage is such: That if all the indebtedness hereby secured is punctually paid to the Mortgagee on or before January 1, 1960, its successors or assigns, according to the tenor of any instrument or instruments evidencing the same and the Mortgagor shall punctually perform the Mortgagor's covenants herein contained, then this mortgage shall become null and void; otherwise the same shall remain in full force and effect.

The terms "Mortgagor" wherever used herein shall include the Mortgagor's successors and assigns and the context shall be construed accordingly, all to the end that the mortgage, covenants and all other provisions of this mortgage in favor of the Mortgagee and the Mortgagee's rights and remedies hereunder shall be most fully effective without any derogation whatsoever. This mortgage and the covenants and all other provisions hereof shall inure to the benefit of the Mortgagee and its assigns.

The unenforceability or invalidity of any provision or provisions of this mortgage shall not render any other provision or provisions herein contained unenforceable or invalid.

In witness whereof, the Mortgagor has executed this instrument in four counterparts this 22nd day of May, 1952.

WESTMORELAND MANGANESE CORPORATION

By /s/ Orville E. Sellers
President

ATTEST:
/s/ William H. Specht
Secretary

EXHIBIT D

SUPPLEMENTAL MORTGAGE

The undersigned, Westmoreland Manganese Corporation, a corporation under the laws of Maryland (herein called "Mortgagor"), has heretofore executed unto the United States of America (herein called "Mortgagee") a Real Estate and Chattel Mortgage, of even date herewith, conveying to Mortgagee the properties therein mentioned, as security for the repayment to Mortgagee of—

(a) all sums at any time hereafter advanced by Mortgagee to Mortgagor against the Promissory Note of the Mortgagor, of even date herewith, in the principal sum of $3,807,250.00, bearing interest from date until paid at the rate of four per cent per annum, payable (subject to the maturity acceleration provisions contained in said Real Estate and Chattel Mortgage and in this Supplemental Mortgage) on or before January 1, 1960, and

(b) any additional amounts (with all interest accruing thereon) at any time hereafter advanced by Mortgagee to Mortgagor, or which may hereafter become due and owing by Mortgagor to

Mortgagee, pursuant to a Letter Agreement dated April 7, 1952, between Mortgagee and Mortgagor, or any future amendment thereto, or pursuant to any definitive contract which may hereafter be entered into between Mortgagee and Mortgagor for the purpose of superseding said Letter Agreement,

which advances (with the interest thereon) are repayable to Mortgagee as provided in said Letter Agreement of April 7, 1952, or any future amendment thereto, or as provided in any definitive contract which may hereafter be executed for the purpose aforesaid.

Said Real Estate and Chattel Mortgage, of even date herewith, is being established of record as a real estate encumbrance in Izard County, Arkansas, and in Independence County, Arkansas, and as a chattel encumbrance in Independence County, Arkansas, and in Pulaski County, Arkansas, concurrently with the establishment of record in said counties of this Supplemental Mortgage.

For the purpose of supplementing the provisions of said Real Estate and Chattel Mortgage, of even date herewith, and without waiving any rights accruing to the Mortgagee thereunder, it is hereby agreed by the Mortgagor:

I

For the purpose of making more explicit the description of certain properties encumbered by said Real Estate and Chattel Mortgage, it is here acknowledged by Mortgagor that said Real Estate and Chattel Mortgage was intended to, and does, grant, bargain, sell and convey to Mortgagee:

(A) The manganese washing and concentrating plant now owned by Mortgagor and located in Independence County, Arkansas, approximately seven miles from the town of Cushman, together with all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, sidings, switch

tracks and all other machinery, equipment and personal property (including office equipment and automotive equipment) now or at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect.

(B) The manganese washing and concentrating plant (of an estimated daily capacity of six thousand long tons) which is to be constructed by Mortgagor and located in Independence County, Arkansas, approximately seven miles from the town of Cushman, at or near the site of the present plant mentioned in (A) aforesaid, together with all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, slime pond facilities, sidings, switch tracks and all other machinery, equipment and personal property (including office equipment and automotive equipment) at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect.

(C) All other machinery, equipment and personal property (whether similar or dissimilar to any of the foregoing), wherever located, now owned by Mortgagor or at any time hereafter acquired by it.

(D) All land, and interests therein, located in Independence County, Arkansas, or in Izard County, Arkansas, or in any other county within the State of Arkansas (and regardless of whether the same may or may not be specifically described in the above mentioned Real Estate and Chattel Mortgage) now owned by Mortgagor or at any time hereafter acquired by it.

(E) All interest in minerals located in, under or upon lands in Independence County, Arkansas, Izard County, Arkansas, or any other county in the State of Arkansas (the term "interests" including leasehold interests, mining and exploration rights, or the absolute ownership of minerals *in situ*), now owned by Mortgagor, regardless of whether the same may or may not be specifically de-

scribed in said Real Estate and Chattel Mortgage, and all such interests at any time hereafter acquired by it.

(F) All easements, rights-of-way, franchises and privileges now owned by Mortgagor or at any time hereafter acquired by it.

(G) All ores and ore products at any time owned by the Mortgagor, whether produced from lands mined by Mortgagor or otherwise; including particularly all manganese ores produced through Mortgagor's operations.

II

While it is agreed that all future acquisitions by Mortgagor of real property, mineral interests and personal property shall, by virtue of the "after acquired property" provisions of said Real Estate and Chattel Mortgage, and of this Supplemental Mortgage, be subject to the lien of each of said two instruments, nevertheless, to the end that such future acquisitions may be encumbered under instruments more specifically describing the same, Mortgagor agrees that it will, from time to time, upon request of Mortgagee, execute, acknowledge and deliver to Mortgagee, and cause to be established of record, such additional instruments, on form approved by Mortgagee, as may be necessary to encumber all such after acquired property items under a more specific description. The failure or refusal in any instance to execute such additional instruments and establish the same of record shall constitute a ground for the acceleration (at Mortgagee's option) of the maturity of the secured indebtedness additional to the events of acceleration recited in said Real Estate and Chattel Mortgage.

III

As to each item of property conveyed by Mortgagor to Mortgagee under said Real Estate and Chattel Mortgage, or under this Supplemental Mortgage, it is the intention of the Mortgagor to convey the full fee simple ownership in the instance of Real Estate or the absolute ownership in the instance of personal property. Mortga-

gor's warranty of title, however, is limited to the extent set out in said Real Estate and Chattel Mortgage.

IV

It being understood that the cost of constructing the proposed manganese washing and concentrating plant (to be erected as provided in Paragraph (B) of Subdivision I aforesaid) is to be paid out of the proceeds of the advances to be made by Mortgagee to Mortgagor as hereinabove set out, it is understood (and notice is hereby given) that the lien of the Mortgagee under said Real Estate and Chattel Mortgage and under this Supplemental Mortgage upon said manganese washing and concentrating plant (and the site thereof) will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien.

V

In addition to the events for the optional acceleration of maturities recited in said Real Estate and Chattel Mortgage, it is agreed that the entire indebtedness secured by said Real Estate and Chattel Mortgage, and by this Supplemental Mortgage, shall automatically become due and payable, without notice or demand, upon the adjudication of the mortgagor as a bankrupt. Moreover, it is particularly understood that if the Mortgagor shall at any time hereafter convey its interest in the mortgaged properties, or shall transfer such properties to another corporation through merger, reorganization or otherwise, or shall attempt to make a fraudulent disposition of any of the mortgaged personalty, such act in either event shall constitute an additional ground for the acceleration, at the option of the Mortgagee, of the maturity of the secured indebtedness.

VI

In addition to the waivers of like character contained in the above mentioned Real Estate and Chattel Mortgage, the Mortgagor waives all right of redemption under the act of May 8, 1899, appearing as Section 51-1111 of Arkansas Statutes (1947) Annotated.

VII

It is particularly understood that said Real Estate and Chattel Mortgage, of even date herewith, shall remain in full force and effect as supplemented by the provisions of this Supplemental Mortgage; this Supplemental Mortgage being cumulative to said prior instrument of even date herewith.

In witness whereof, the Mortgagor has executed this instrument in four counterparts on this 22nd day of May, 1952.

WESTMORELAND MANGANESE CORPORATION

By /s/ Orville E. Sellers
President

SEAL

ATTEST:

William H. Specht
Secretary

EXHIBIT G

AMENDMENT NO. 1

TO

LETTER ORDER NO. GS-OOP(D)-12263

BETWEEN

UNITED STATES OF AMERICA

AND

WESTMORELAND MANGANESE CORPORATION

This amendment to Letter Order No. GS-OOP(D)-12263 between the United States of America, acting by and through the Defense Materials Procurement Agency, hereinafter referred to as the "Government" (pursuant to the authority contained in the Defense Production Act of 1950, as amended, and Executive Order No. 10161, as amended and supplemented), and Westmoreland Mangan-

ese Corporation, hereinafter referred to as the "Contractor"

Witnesseth that:

Whereas, the parties hereto entered into Letter Agreement No. GS-OOP(D)-12263, dated April 7, 1952, (hereinafter referred to as the "Contract"), under the terms of which the Contractor covenanted to construct facilities (as defined in the aforesaid Contract), at or near Cushman, Arkansas, which would enable Contractor to produce and process manganese ore within a period of one year from the date of the Contract; and

Whereas, the aforesaid facilities have not been completed and the production of manganese ore will not be commenced within the period provided in the Contract; and

Whereas, the Contractor is without funds to complete the aforesaid facilities and has currently outstanding due and overdue financial obligations to employees, ex-employees, suppliers, contractors and general creditors, which obligations the Contractor is unable to meet.

Now, therefore, in consideration of the mutual promises herein contained and other good and valuable consideration, the parties hereto agree as follows:

1. The Contractor shall place the facilities in a temporary standby condition and shall employ standard methods for preserving the facilities from the elements, theft and damage. All operations at the facilities shall cease, except that the Contractor shall continue with the program for mineral drilling now currently in progress. Funds for the payment of the costs of such drilling program and costs for the maintenance of the facilities while in a standby state shall be made available by the Government out of funds to be provided under the terms of the Contract. Disbursement of such funds shall be made in accordance with the provisions of paragraph 2 hereof, and allowable costs for such work shall be subject to approval by the Government.

2. To enable the Contractor to meet certain of the aforesaid outstanding accrued obligations, the Government shall advance to the Contractor out of funds allotted pursuant to the Contract not to exceed $29,080.42, which sum shall be advanced by the Government to the Contractor only on the condition that the Contractor raises and provides the sum of Fifteen Thousand ($15,000) Dollars to be used to help meet the aforesaid obligations; the aggregate of the aforesaid funds shall be disbursed under procedures to be prescribed by the Government. Current obligations payable pursuant to this paragraph shall be principally the accrued and payable wages and salaries of Contractor's bona fide employees of the clerical, laborer and supervisory class. All obligations payable out of the aforesaid aggregate funds shall be determined by the Government. The expenses of the drilling program and maintenance of the facilities referred to in paragraph 1 hereof shall be paid under procedures to be prescribed by the Government.

3. Notwithstanding any provision in the Contract to the contrary, the Contractor hereby grants to the Government the unqualified right and privilege of terminating the Contract at any time in the future up to commencement of production upon determination by the Government that termination of the Contract is in the best interest of the Government; the Contractor shall take no legal action to prevent such termination of the Contract by the Government, and disclaims any and all recourse by reason of such termination by the Government.

4. Under the terms of a mortgage instrument made by the Contractor to the Government on May 22, 1952, pursuant to the terms of the Contract, it is provided that the Contractor shall have sixty (60) days from notice to remedy the Contractor's failure or refusal to perform any covenant, agreement or condition in the Contract, note or mortgage as a condition precedent to foreclosure. Contractor hereby waives the sixty-day period granted by said mortgage within which to remedy the breach, and agrees that henceforth all moratorium provisions contained in said mortgage shall be without force and effect, and in the

event of termination of the Contract as provided in paragraph 3 hereof, the Contractor shall, on demand of the Government, grant the Government immediate possession of the facilities, with the right to use the facilities in place or off-site, either directly or by contract, and the Government may lease and dispose of such facilities, provided, however, that nothing herein contained shall prejudice or impair the right of the Contractor to an accounting. Contractor shall, at the request of the Government, execute, deliver and record a supplemental mortgage under the terms of which the aforesaid sixty-day moratorium provisions shall be deleted from the original recorded mortgage.

5. The unexpended balance of the funds advanced to the Contractor now on deposit in the special bank account in the First National Bank, Batesville, Arkansas, shall be withdrawn and returned to the Government, the account of the Contractor shall be properly credited with such refund.

In witness whereof, the parties hereto have caused this document to be executed on this 2nd day of April, 1953.

UNITED STATES OF AMERICA

Acting by and through
Defense Materials Procurement Agency

By /s/ Tom Lyon
Acting Deputy Administrator

ATTEST:

WESTMORELAND MANGANESE CORPORATION
By /s/ E. P. Blough
Title: Treasurer

By /s/ W. H. Specht
Title: Secretary
GSA-WASH DC 53-11486

SEPARATE ANSWER AND CROSS-COMPLAINT OF ARKANSAS FOUNDRY COMPANY

(Filed in U. S. District Court on February 23, 1954)

This Defendant, Arkansas Foundry Company, for its Separate Answer to the Complaint states:

I

It admits the allegations of paragraph I of the Complaint.

II

It admits the allegations of paragraph II of the Complaint.

III

It admits the allegations of paragraph III of the Complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have the effect alleged by Plaintiff; denies that it evedinced any valid subsisting indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to plaintiff, and denies that there was any such existing indebtedness.

IV

It admits the allegation of paragraph IV of the Complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit "C" to its Complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate and (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation, and against which the plaintiff now seeks to have its alleged "mortgage" lien claim enforced. This defendant denies that said alleged "mortgage" created a first lien on the alleged "mortgaged property to secure amounts advanced by the plaintiff to West-

moreland" superior to the statutory lien of this defendant for materials and supplies furnished by this defendant to Westmoreland. This defendant denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal to or superior to the statutory lien of this defendant.

V

It admits the allegations of paragraph V of the Complaint only as to the execution of the instrument designated as a "Supplemental Mortgage", and referred to as Exhibit "D" to the Complaint, but denies that the same in fact is a valid mortgage, in that it does not grant or convey any real estate, and, (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant, Westmoreland Manganese Corporation, against which the plaintiff now seeks to have its lien claim enforced, and denies that the said alleged mortgage created a mortgage lien that "would take priority over the lien of any mechanic, materialman, laborer or any other statutory lien", and denies that the said "Supplemental Mortgage" created a mortgage lien superior to that of this defendant for material and supplies furnished to Westmoreland, and denies that plaintiff has or is entitled to any lien against any of the property held or owned by the defendant, Westmoreland Manganese Corporation, equal to or superior to the statutory lien of this defendant.

VI

It admits the allegations of paragraph VI of the Complaint.

VII

It admits the allegations of paragraph VII of the Complaint.

VIII

It admits only the execution of the Agreement entitled "Amendment No. 1 to Letter Order No. GS- from asserting a lien superior to that of this defendant

OOP(D)-12263", but denies that it had or was intended have the effect alleged by the plaintiff; denies that such Amendment to Letter Order, or any other correspondence between the plaintiff, or any of its agencies, and the defendant, Westmoreland Manganese Corporation, in any manner affected the rights of this defendant to its statutory lien and the superiority thereof, and this defendant states that the said Agreement is void for lack of consideration as between the parties and is void as against this defendant, insofar as it may or as it attempts to defeat this defendant of this statutory lien as hereinafter set forth.

IX

It admits this defendant's claim of lien as alleged in paragraph IX of the Complaint, but states that the lien claimed by this defendant, Arkansas Foundry Company, in addition to being a mechanic's and or materialman's lien generally as provided by 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

X

It is without information upon which to base a denial or an admission of the allegations of paragraph X of the Complaint.

XI

It is without information upon which to base a denial or an admission of the allegations of paragraph XI of the Complaint.

XII

It is without information upon which to base a denial or an admission of the allegations of paragraph XII of the Complaint.

XIII

It is without information upon which to base a denial or an admission of the allegations of paragraph XIII of the Complaint.

XIV

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant, Westmoreland Manganese Corporation, and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph XIV of the Complaint, this defendant lacks information to either deny or admit.

XV

And further answering, this defendant, Arkansas Foundry Company, an Arkansas corporation with its principal place of business in the City of Little Rock, in said State, states that between the dates of November 25, 1952, and March 24, 1953, it sold and delivered to the defendant Westmoreland Manganese Corporation, on its direct purchase orders therefor, certain materials and supplies which were furnished for and were used in construction of the plant and buildings of Westmoreland Manganese Corporation, and which are a part of the property against which the plaintiff is now seeking a foreclosure under its alleged "mortgage". That on April 29, 1953, this defendant filed its statement of account and affidavit for lien with the Clerk of the Circuit Court of Independence County, Arkansas, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of the Arkansas Statutes of 1947, Anfotated, thereby asserting and preserving its lien for $48,858.65, plus interest of $409.31, making a total of $49,267.96, and interest on the principal amount of $48,858.65 at 6% from the date of the filing of said affidavit for lien until paid. That said statement of account and affidavit for lien was duly filed in the Office of the Clerk of the Circuit and Chancery Court and Recorder for the County of Independence, State of Arkansas, and now appears of record in the Office of the Circuit Clerk of said County in Book

"B", page "W's" of Mechanic Liens. A copy of the said statement of account and affidavit for lien is attached hereto, made a part hereof, and marked Exhibit "A".

This defendant alleges and here asserts its lien so filed and perfected in the sum of $49,267.96, together with interest thereon, as a first, prior and paramount lien upon and against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's Complaint, and all improvements, machinery, materials, supplies and equipment thereon.

This defendant here asserts that the said lien in the sum of $49,267.96, together with interest thereon at the rate of 6% from April 29, 1953, until paid, is superior to the claim of lien against any of the said properties of Westmoreland Manganese Corporation by the Plaintiff.

XVI

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph II of plaintiff's Complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant, Westmoreland Manganese Corporation, the sum of $930,751.21, which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00, and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure

of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

XVII

And further answering, this Defendant states that the Plaintiff by the terms of its Contract with the Defendant, Westmoreland, which Contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said Defendant, and is jointly liable to this Defendant, Arkansas Foundry Company, to the extent of its commitment to advance funds for the "development, equipment, and preparation of the above-named property (i.e. deposits owned by Westmoreland located near Cushman, Arkansas) for the production of manganese ore"; that the Plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland on that basis and for that purpose and not on the basis of an interest-bearing loan secured by a mortgage, as Plaintiff now by its Complaint attempts to make it appear: That the said transactions as between the plaintiff and the defendant, Westmoreland Manganese Corporation, and as set out in the Complaint, were not in the nature of an interest-bearing loan for moneys loaned by the Plaintiff to Westmoreland, and were not intended as such, but were in truth and in fact moneys advanced by the Plaintiff to the defendant, Westmoreland Manganese Corporation, for manganese to be delivered by Westmoreland to the plaintiff in the future and after the plant was in production.

This Defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland properties into production of manganese; that the Plaintiff under paragraph 6 of the original Contract of April 7, 1952, with Westmoreland had the

"right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation."

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.*"

And this Defendant states that the Plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this Defendant, and allowed such advances to be used for other purposes, and this Defendant states that the Plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of this Defendant.

XVIII

That Plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

This defendant further states that the plaintiff by its Contract with Westmoreland was committed to advance to Westmoreland as advance payments against manganese to be produced, moneys up to $3,807,250.00; said moneys to be used for the acquisition and completion of new facilities and to put the properties in the production of manganese, and relying on this commitment and agreement of the plaintiff with Westmoreland, this defendant sold and delivered materials to Westmoreland; that the plaintiff has failed and refused to keep its agreement with Westmoreland and has refused to advance the agreed amount to Westmoreland, and that it stood by and encouraged and allowed this defendant to deliver materials to Westmoreland to the extent of $48,858.65, when it knew, or by the exercise of due care, and by the exercise of the power and authority the plaintiff had attempted to reserve and to contract for, over the purchase of material, equipment and supplies, and the payment therefor, out of funds advanced and to be advanced to Westmoreland, should have known that it was not going to advance the full amount of the commitment, and on this account the plaintiff is estopped

Wherefore, this defendant prays that the alleged "mortgage" sought to be foreclosed in this action by the plaintiff be declared to be invalid and inoperative as a mortgage or as creating a mortgage lien against the properties described therein.

This defendant further prays that its lien claim in the amount of Forty-Nine Thousand Two Hundred Sixty-Seven and 96 100 Dollars ($49,267.96), together with interest until date of payment, attach to the land described in the statement of account and affidavit for lien, Exhibit "A" hereto, and to all of the material, supplies and improvements made upon Westmoreland Manganese Corporation's land in question, in preference to any alleged lien or mortgage lien of the plaintiff upon the land and the machinery, material, supplies or specific improvements, placed or located thereon.

This defendant further prays that its statutory lien be declared to be prior, paramount and superior to the alleged claimed mortgage lien of the plaintiff both as to the improvements on the lands and the lands themselves and that the plaintiff be adjudged to be estopped to assert its lien as a paramount or superior lien to that of this defendant.

CROSS-COMPLAINT

This defendant, Arkansas Foundry Company, as Cross-complainant, for its Cross-complaint herein alleges that the defendant, Westmoreland Manganese Corporation, is indebted to it in the sum of $49,265.96, together with interest thereon at the rate of 6% per annum from April 29, 1953, until paid, for which it is entitled to a lien as hereinabove set forth. Certified copies of this defendant's account and affidavit for lien are attached as Exhibit "A" to the Answer and referred to and made Exhibit "A" likewise to this Cross-complaint.

Wherefore, this defendant, and cross-complainant prays for judgment against the defendant, Westmoreland Manganese Corporation in the sum of $49,267.96, together with interest thereon at the rate of 6% per annum from April 29, 1953, until paid, and prays that said judgment

be declared to be a prior, paramount lien upon the following described property:

The Southwest Quarter ($SW^1/_4$) of the Northwest Quarter ($NW^1/_4$) and the North Half ($N^1/_2$) of the Southwest Quarter ($SW^1/_4$), Section Thirty-one (31), Township Fifteen (15) North, Range Six (6) West, Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements; including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein, consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8 D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to this judgment, for its costs, and any and all other relief to which it may appear to be entitled.

Arkansas Foundry Company
By Barber, Henry & Thurman
By /s/ E. A. Henry
Attorneys for Defendant
1408 Donaghey Building,
Little Rock, Arkansas

SEPARATE ANSWER AND CROSS-COMPLAINT OF CROW-BURLINGAME COMPANY

(Filed in U. S. District Court on February 23, 1954)

This Defendant, Crow-Burlingame Company, for its Separate Answer to the Complaint states:

I

It admits the allegations of paragraph I of the Complaint.

II

It admits the allegations of paragraph II of the Complaint.

III

It admits the allegations of paragraph III of the Complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have the effect alleged by Plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to plaintiff, and denies that there was any such existing indebtedness.

IV

It admits the allegation of paragraph IV of the Complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit "C" to its Complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate and (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation, and against which the plaintiff now seeks to have its alleged "mortgage" lien claim enforced. This defendant denies that said alleged "mortgage" created a first lien on the alleged "mortgaged property to secure amounts advanced by the plaintiff to Westmoreland" superior to the statutory lien of this defendant

for materials and supplies furnished by this defendant to Westmoreland. This defendant denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal to or superior to the statutory lien of this defendant.

V

It admits the allegations of paragraph V of the Complaint only as to the execution of the instrument designated as a "Supplemental Mortgage", and referred to as Exhibit "D" to the Complaint, but denies that the same in fact is a valid mortgage, in that it does not grant or convey any real estate, and, (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant, Westmoreland Manganese Corporation, against which the plaintiff now seeks to have its lien claim enforced, and denies that the said alleged mortgage created a mortgage lien that "would take priority over the lien of any mechanic, materialman, laborer or any other statutory lien", and denies that the said "Supplemental Mortgage" created a mortgage lien superior to that of this defendant for material and supplies furnished to Westmoreland and denies that plaintiff has or is entitled to any lien against any of the property held or owned by the defendant, Westmoreland Manganese Corporation, equal to or superior to the statutory lien of this defendant.

VI

It admits the allegations of paragraph VI of the Complaint.

VII

It admits the allegations of paragraph VII of the Complaint.

VIII

It admits only the execution of the Agreement entitled "Amendment No. 1 to Letter Order No. GS-00P-D-12263", but denies that it had or was intended to have the effect alleged by the plaintiff, denies that such

Amendment to Letter Order, or any other correspondence between the plaintiff, or any of its agencies, and the defendant, Westmoreland Manganese Corporation, in any manner affected the rights of this defendant to its statutory lien and the superiority thereof, and this defendant states that the said Agreement is void for lack of consideration as between the parties and is void as against this defendant, insofar as it may or as it attempts to defeat this defendant of this statutory lien as hereinafter set forth.

IX

It admits this defendant's claim of lien as alleged in paragraph IX of the Complaint, but states that the lien claimed by this defendant, Crow-Burlingame Company, in addition to being a mechanic's and or materialman's lien generally as provided by Sections 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

X

It is without information upon which to base a denial or an admission of the allegations of paragraph X of the Complaint.

XI

It is without information upon which to base a denial or an admission of the allegations of paragraph XI of the Complaint.

XII

It is without information upon which to base a denial or an admission of the allegations of paragraph XII of the Complaint.

XIII

It is without information upon which to base a denial or an admission of the allegations of paragraph XIII of the Complaint.

XIV

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant, Westmoreland Manganese Corporation, and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph XIV of the Complaint, this defendant lacks information to either deny or admit.

XV

And further answering, this defendant, Crow-Burlingame Company, an Arkansas corporation with its principal place of business in the City of Little Rock, in said State, states that between the dates of December 22, 1952, and March 10, 1953, Crow-Burlingame Co. sold and delivered to the defendant Westmoreland Manganese Corporation, on its direct purchase orders therefor, certain materials and supplies which were furnished for and were used in construction of the plant and buildings of Westmoreland Manganese Corporation, and which are a part of the property against which the plaintiff is now seeking a foreclosure under its alleged "mortgage". That on June 1, 1953, this defendant filed its statement of account and affidavit for lien with the Clerk of the Circuit Court of Independence County, Arkansas, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of the Arkansas Statutes of 1947, Annotated, thereby asserting and preserving its lien for $4,297.32, plus interest of $68.80, making a total of $4,366.12, and interest on the principal amount of $4,297.32, at 6% per annum from the date of the filing of said affidavit for lien until paid. That said statement of account and affidavit for lien was duly filed in the Office of the Clerk of the Circuit and Chancery Court and Recorder for the County of Independence, State of Arkansas, and now appears of record in the Office of the Circuit Clerk of said County in Book "B", page "W's" of Mechanics Liens. A copy of

the said statement of account and affidavit for lien is attached hereto, made a part hereof, and marked Exhibit "A".

This defendant alleges and here asserts its lien so filed and perfected in the sum of $4,366.12, together with interest thereon, as a first, prior and paramount lien upon and against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's Complaint, and all improvements, machinery, materials, supplies and equipment thereon.

This defendant here asserts that the said lien in the sum of $4,366.12, together with interest thereon at the rate of 6% per annum from June 1, 1953, until paid, is superior to the claim of lien against any of the said properties of Westmoreland Manganese Corporation by the Plaintiff.

XVI

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph II of plaintiff's Complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant, Westmoreland Manganese Corporation, the sum of $930,751.21, which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00, and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure

of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

XVII

And further answering, this Defendant states that the Plaintiff by the terms of its Contract with the Defendant, Westmoreland, which Contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said Defendant, and is jointly liable to this Defendant, Crow-Burlingame Company, to the extent of its commitment to advance funds for the "development, equipment, and preparation of the above-named property (i.e. deposits owned by Westmoreland, located near Cushman, Arkansas) for the production of manganese ore"; that the Plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland on that basis and for that purpose and not on the basis of an interest-bearing loan secured by a mortgage, as Plaintiff now by its Complaint attempts to make it appear: That the said transactions as between the plaintiff and the defendant, Westmoreland Manganese Corporation, and as set out in the Complaint, were not in the nature of an interest-bearing loan for moneys loaned by the Plaintiff to Westmoreland, and were not intended as such, but were in truth and in fact moneys advanced by the plaintiff to the defendant, Westmoreland Manganese Corporation, for manganese to be delivered by Westmoreland to the plaintiff in the future and after the plant was in production.

This Defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland properties into production of manganese; that the Plaintiff under paragraph 8 of the original Contract of April 7, 1952, with Westmoreland had the

"right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation."

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.*"

And this Defendant states that the Plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this Defendant, and allowed such advances to be used for other purposes, and this Defendant states that the Plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of this Defendant.

XVIII

That Plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

This defendant further states that the plaintiff by its Contract with Westmoreland was committed to advance to Westmoreland as advance payments against manganese to be produced, moneys up to $3,807,250.00; said moneys to be used for the acquisition and completion of new facilities and to put the properties in the production of manganese, and relying on this commitment and agreement of the plaintiff with Westmoreland, this defendant sold and delivered materials to Westmoreland; that the plaintiff has failed and refused to keep its agreement with Westmoreland and has refused to advance the agreed amount to Westmoreland, and that it stood by and encouraged and allowed this defendant to deliver materials to Westmoreland to the extent of $4,297.32, when it knew, or by the exercise of due care, and by the exercise of the power and authority the plaintiff had attempted to reserve and to contract for, over the purchase of material, equipment and supplies, and the payment therefor, out of funds advanced and to be advanced to Westmoreland, should have known, that it was not going to advance the full amount of the commitment, and on this account the plaintiff is estopped from asserting a lien superior to that of this defendant.

Wherefore, this defendant prays that the alleged "mortgage" sought to be foreclosed in this action by the plaintiff be declared to be invalid and inoperative as a mortgage or as creating a mortgage lien against the properties described therein.

This defendant further prays that its lien claim in the amount of Four Thousand Three Hundred Sixty-Six and 12 100 Dollars ($4,366.12), together with interest until date of payment, attach to the land described in the statement of account and affidavit for lien, Exhibit "A" hereto, and to all of the material, supplies and improvements made upon Westmoreland Manganese Corporation's land in question, in preference to any alleged lien or mortgage lien of the plaintiff upon the land and the machinery, material, supplies or specific improvements, placed or located thereon.

This defendant further prays that its statutory lien be declared to be prior, paramount and superior to the alleged claimed mortgage lien of the plaintiff both as to the improvements on the lands and the lands themselves and that the plaintiff be adjudged to be estopped to assert its lien as a paramount or superior lien to that of this defendant.

CROSS-COMPLAINT

This defendant, Crow-Burlingame Company, as Cross-complainant, for its Cross-complaint herein alleges that the defendant, Westmoreland Manganese Corporation, is indebted to it in the sum of Four Thousand Three Hundred Sixty-six and 12 100 Dollars ($4,366.12), together with interest thereon at the rate of 6% per annum from June 1, 1953, until paid, for which it is entitled to a lien as hereinabove set forth. Certified copies of this defendant's account and affidavit for lien are attached as Exhibit "A" to the Answer and referred to and made Exhibit "A" likewise to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant, Westmoreland Manganese Corporation in the sum of Four Thousand Three Hundred Sixty-six and 12 100 Dollars ($4,366.12), together with interest thereon at the rate of 6% per annum

from June 1, 1953, until paid, and prays that said judgment be declared to be a prior, paramount lien upon the following described property:

The Southwest Quarter (SW¼) of the Northwest Quarter (NW¼) and the North Half (N½) of the Southwest Quarter (SW¼), Section Thirty-one (31), Township Fifteen (15) North, Range Six (6) West, Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein, consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers; six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

Crow-Burlingame Company
By Barber, Henry & Thurman
By s E. A. Henry
Attorneys for Defendant
1408 Donaghey Building,
Little Rock, Arkansas

SEPARATE ANSWER AND CROSS-COMPLAINT OF MILL & MINE SUPPLY COMPANY

(Filed in U. S. District Court on February 23, 1954)

This Defendant, Mill & Mine Supply Company, for its Separate Answer to the Complaint states:

I

It admits the allegations of paragraph I of the Complaint.

II

It admits the allegations of paragraph II of the Complaint.

III

It admits the allegations of paragraph III of the Complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have the effect alleged by Plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to plaintiff, and denies that there was any such existing indebtedness.

IV

It admits the allegation of paragraph IV of the Complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit "C" to its Complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate and (except as to limited items of personalty specifically designated) does not grant or convey any personal property of sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation, and against which the plaintiff now seeks to have its alleged "mortgage" lien claim enforced. This defendant denies that said alleged "mortgage" created a first lien on the alleged "mortgaged property to secure amounts advanced by the plaintiff to Westmoreland" superior to the statutory lien of this defendant

for materials and supplies furnished by this defendant to Westmoreland. This defendant denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal to or superior to the statutory lien of this defendant.

V

It admits the allegations of paragraph V of the Complaint only as to the execution of the instrument designated as a "Supplemental Mortgage", and referred to as Exhibit "D" to the Complaint, but denies that the same in fact is a valid mortgage, in that it does not grant or convey any real estate, and, (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant, Westmoreland Manganese Corporation, against which the plaintiff now seeks to have its lien claim enforced, and denies that the said alleged mortgage created a mortgage lien that "would take priority over the lien of any mechanic, materialman, laborer or any other statutory lien", and denies that the said "Supplemental Mortgage" created a mortgage lien superior to that of this defendant for material and supplies furnished to Westmoreland, and denies that plaintiff has or is entitled to any lien against any of the property held or owned by the defendant, Westmoreland Manganese Corporation, equal to or superior to the statutory lien of this defendant.

VI

It admits the allegations of paragraph VI of the Complaint.

VII

It admits the allegations of paragraph VII of the Complaint.

VIII

It admits only the execution of the Agreement entitled "Amendment No. 1 to Letter Order No. GS-00P(D)-12263", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such

Amendment to Letter Order, or any other correspondence between the plaintiff, or any of its agencies, and the defendant, Westmoreland Manganese Corporation, in any manner affected the rights of this defendant to its statutory lien and the superiority thereof, and this defendant states that the said Agreement is void for lack of consideration as between the parties and is void as against this defendant, insofar as it may or as it attempts to defeat this defendant of this statutory lien as hereinafter set forth.

IX

It admits this defendant's claim of lien as alleged in paragraph IX of the Complaint, but states that the lien claimed by this defendant, Mill & Mine Supply Company, in addition to being a mechanic's and or materialman's lien generally as provided by Sections 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

X

It is without information upon which to base a denial or an admission of the allegations of paragraph X of the Complaint.

XI

It is without information upon which to base a denial or an admission of the allegations of paragraph XI of the Complaint.

XII

It is without information upon which to base a denial or an admission of the allegations of paragraph XII of the Complaint.

XIII

It is without information upon which to base a denial or an admission of the allegations of paragraph XIII of the Complaint.

XIV

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant, Westmoreland Manganese Corporation, and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph XIV of the Complaint, this defendant lacks information to either deny or admit.

XV

And further answering, this defendant, Mill & Mine Supply Company, an Arkansas corporation with its principal place of business in the City of Little Rock, in said State, states that between the dates of December 24, 1952, and March 2, 1953, it sold and delivered to the defendant Westmoreland Manganese Corporation, on its direct purchase orders therefor, certain materials and supplies which were furnished for and were used in construction of the plant and buildings of Westmoreland Manganese Corporation, and which are a part of the property against which the plaintiff is now seeking a foreclosure under its alleged "mortgage". That on April 24, 1953, this defendant filed its statement of account and affidavit for lien with the Clerk of the Circuit Court of Independence County, Arkansas, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of the Arkansas Statutes of 1947, Annotated, thereby asserting and preserving its lien for $8,312.69, and interest on the principal amount at 6% per annum from the date of the filing of said affidavit for lien until paid. That said statement of account and affidavit for lien was duly filed in the Office of the Clerk of the Circuit and Chancery Court and Recorder for the County of Independence, State of Arkansas, and now appears of record in the Office of the Circuit Clerk of said County in Book "B", page "W's" of Mechanics Liens. A copy of

the said statement of account and affidavit for lien is attached hereto, made a part hereof, and marked Exhibit "A".

This defendant alleges and here asserts its lien so filed and perfected in the sum of $8,312.69, together with interest thereon, as a first, prior and paramount lien upon and against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's Complaint, and all improvements, machinery, materials, supplies and equipment thereon.

This defendant here asserts that the said lien in the sum of $8,312.69, together with interest thereon at the rate of 6% per annum from April 24, 1953, until paid, is superior to the claim of lien against any of the said properties of Westmoreland Manganese Corporation by the Plaintiff.

XVI

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph II of plaintiff's Complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant, Westmoreland Manganese Corporation, the sum of $930,751.21, which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00, and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failur-

of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

XVII

And further answering, this Defendant states that the Plaintiff by the terms of its Contract with the Defendant, Westmoreland, which Contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said Defendant, and is jointly liable to this Defendant, Mill & Mine Supply Company, to the extent of its commitment to advance funds for the "development, equipment, and preparation of the above-named property (i.e. deposits owned by Westmoreland located near Cushman, Arkansas) for the production of manganese ore"; that the Plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland on that basis and for that purpose and not on the basis of an interest-bearing loan secured by a mortgage, as Plaintiff now by its Complaint attempts to make it appear: That the said transactions as between the plaintiff and the defendant, Westmoreland Manganese Corporation, and as set out in the Complaint, were not in the nature of an interest-bearing loan for moneys loaned by the Plaintiff to Westmoreland, and were not intended as such, but were in truth and in fact moneys advanced by the plaintiff to the defendant, Westmoreland Manganese Corporation, for manganese to be delivered by Westmoreland to the plaintiff in the future and after the plant was in production.

This Defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland properties into production of manganese; that the Plaintiff under paragraph 8 of the original Contract of April 7, 1952, with Westmoreland had the

"right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation."

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.*"

And this Defendant states that the Plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this Defendant, and allowed such advances to be used for other purposes, and this Defendant states that the Plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of this Defendant.

XVIII

That Plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn, and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

This defendant further states that the plaintiff by its contract with Westmoreland was committed to advance to Westmoreland as advance payments against manganese to be produced, moneys up to $3,807,250.00, said moneys to be used for the acquisition and completion of new facilities and to put the properties in the production of manganese, and relying on this commitment and agreement of the plaintiff with Westmoreland, this defendant sold and delivered materials to Westmoreland; that the plaintiff has failed and refused to keep its agreement with Westmoreland and has refused to advance the agreed amount to Westmoreland, and that it stood by and encouraged and allowed this defendant to deliver materials to Westmoreland to the extent of $8,312.69, when it knew, or by the exercise of due care, and by the exercise of the power and authority the plaintiff had attempted to reserve and to contract for, over the purchase of material, equipment and supplies, and the payment therefor, out of funds advanced and to be advanced to Westmoreland, should have known that it was not going to advance the full amount of the commitment, and on this account the plaintiff is estopped from asserting a lien superior to that of this defendant.

Wherefore, this defendant prays that the alleged "mortgage" sought to be foreclosed in this action by the plaintiff be declared to be invalid and inoperative as a mortgage or as creating a mortgage lien against the properties described therein.

This defendant further prays that its lien claim in the amount of Eight Thousand Three Hundred Twelve and 69/100 Dollars ($8,312.69), together with interest until date of payment, attach to the land described in the statement of account and affidavit for lien, Exhibit "A" hereto, and to all of the material, supplies and improvements made upon Westmoreland Manganese Corporation's land in question, in preference to any alleged lien or mortgage lien of the plaintiff upon the land and the machinery, material, supplies or specific improvements placed or located thereon.

This defendant further prays that its statutory lien be declared to be prior, paramount and superior to the alleged claimed mortgage lien of the plaintiff both as to the improvements on the lands and the lands themselves and that the plaintiff be adjudged to be estopped to assert its lien as a paramount or superior lien to that of this defendant.

CROSS-COMPLAINT

This defendant, Mill & Mine Supply Company, as Cross-complainant, for its Cross-complaint herein alleges that the defendant, Westmoreland Manganese Corporation, is indebted to it in the sum of $8,312.69, together with interest thereon at the rate of 6% per annum from June 1, 1953, until paid, for which it is entitled to a lien as hereinabove set forth. Certified copies of this defendant's account and affidavit for lien are attached as Exhibit "A" to the Answer and referred to and made Exhibit "A" likewise to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant, Westmoreland Manganese Corporation in the sum of Eight Thousand Three Hundred Twelve and 69/100 Dollars ($8,312.69), together with interest thereon at the rate of 6% per annum

from April 24, 1953, until paid, and prays that said judgment be declared to be a prior, paramount lien upon the following described property:

The Southwest Quarter (SW¼) of the Northwest Quarter (NW¼) and the North Half (N½) of the Southwest Quarter (SW¼); Section Thirty-one (31), Township Fifteen (15) North, Range Six (6) West, Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein, consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

Mill & Mine Supply Company
By Barber, Henry & Thurman
By /s/ E. A. Henry
Attorneys for Defendant
1408 Donaghey Building,
Little Rock, Arkansas

SEPARATE ANSWER AND CROSS-COMPLAINT OF PADGETT LUMBER COMPANY

(Filed in U. S. District Court on February 25, 1954)

This defendant, Padgett Lumber Company, for its Separate Answer to the Complaint states:

1.

It admits the allegations of paragraph I of the Complaint.

2.

It admits the allegations of paragraph II of the Complaint.

3.

It admits the allegations of paragraph III of the Complaint, only as to the execution of the alleged "mortgage note"; but denies that said instrument had, or was intended to have the effect alleged by Plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to plaintiff, and denies that there was any such existing indebtedness.

4.

It admits the allegation of paragraph IV of the Complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit "C" to its Complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate and (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation, and against which the plaintiff now seeks to have its alleged "mortgage" lien claim enforced. This defendant denies that said alleged "mortgage" created a first lien on the alleged "mortgaged property to secure amounts advanced by the plaintiff to West-

moreland" superior to the statutory lien of this defendant for materials and supplies furnished by this defendant to Westmoreland. This defendant denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal to or superior to the statutory lien of this defendant.

5.

It admits the allegations of paragraph V of the Complaint only as to the execution of the instrument designated as a "Supplemental Mortgage", and referred to as Exhibit "D" to the Complaint, but denies that the same in fact is a valid mortgage, in that it does not grant or convey any real estate, and, (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant, Westmoreland Manganese Corporation, against which the plaintiff now seeks to have its lien claim enforced, and denies that the said alleged mortgage created a mortgage lien that "would take priority over the lien of any mechanic, materialman, laborer or any other statutory lien", and denies that the said "Supplemental Mortgage" created a mortgage lien superior to that of this defendant for material and supplies furnished to Westmoreland, and denies that plaintiff has or is entitled to any lien against any of the property held or owned by the defendant, Westmoreland Manganese Corporation, equal to or superior to the statutory lien of this defendant.

6.

It admits the allegations of paragraph VI of the Complaint.

7.

It admits the allegations of paragraph VII of the Complaint.

8.

It admits only the execution of the Agreement entitled "Amendment No. 1 to Letter Order No. GS-

OOP(D)-1226 3", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such Amendment to Letter Order, or any other correspondence between the plaintiff, or any of its agencies, and the defendant, Westmoreland Manganese Corporation, in any manner affected the rights of this defendant to its statutory lien and the superiority thereof, and this defendant states that the said Agreement is void for lack of consideration as between the parties and is void as against this defendant, insofar as it may or as it attempts to defeat this defendant of this statutory lien as hereinafter set forth.

9.

It admits this defendant's claim of lien as alleged in paragraph IX of the Complaint, but states that the lien claimed by this defendant, Padgett Lumber Company, in addition to being a mechanic's and or materialman's lien generally as provided by Sections 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

It is without information upon which to base a denial or an admission of the allegations of paragraph X of the Complaint.

11.

It is without information upon which to base a denial or an admission of the allegations of paragraph XI of the Complaint.

12.

It is without information upon which to base a denial or an admission of the allegations of paragraph XII of the Complaint.

13.

It is without information upon which to base a denial or an admission of the allegations of paragraph XIII of the Complaint.

14.

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant, Westmoreland Manganese Corporation, and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph XIV of the Complaint, this defendant lacks information to either deny or admit.

15.

Further answering, this defendant, Padgett Lumber Company, a corporation organized and existing under the laws of the State of Arkansas, between November 2, 1952, and February 25, 1953, both inclusive, sold and delivered to the defendant Westmoreland Manganese Corporation material for Westmoreland Manganese Corporation under direct purchase order as set forth in Exhibit "A" made a part of this defendant's Account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, April 17, 1953, and amendment thereto filed May 6, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby asserting and preserving its lien for $3,866.20 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon.

This defendant here asserts its said lien in the sum of $3,866.20 together with interest thereon at the rate of six per centum per annum from April 17, 1953, until paid, superior to the claim of lien against any of said properties of Westmoreland Manganese Corporation by the plaintiff.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph II of plaintiff's Complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintifff failed and refused to pay over or make available to the defendant, Westmoreland Manganese Corporation, the sum of $930,751.21, which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00, and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this Defendant states that the Plaintiff by the terms of its Contract with the De-

fendant, Westmoreland, which Contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said Defendant, and is jointly liable to this Defendant, Padgett Lumber Company, to the extent of its commitment to advance funds for the "development, equipment, and preparation of the above-named property (i.e. deposits owned by Westmoreland located near Cushman, Arkansas) for the production of manganese ore"; that the Plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland on that basis and for that purpose and not on the basis of an interest-bearing loan secured by a mortgage, as Plaintiff now by its Complaint attempts to make it appear: That the said transactions as between the plaintiff and the defendant, Westmoreland Manganese Corporation, and as set out in the Complaint, were not in the nature of an interest-bearing loan for moneys loaned by the Plaintiff to Westmoreland, and were not intended as such, but were in truth and in fact moneys advanced by the plaintiff to the defendant, Westmoreland Manganese Corporation, for manganese to be delivered by Westmoreland to the plaintiff in the future and after the plant was in production.

This Defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland properties into production of manganese; that the Plaintiff under paragraph 8 of the original Contract of April 7, 1952, with Westmoreland had the

> "right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation."

And under paragraphs 5(a) (b), and (c) of the said Contract it was provided as follows:

> "(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made

by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.*"

And this Defendant states that the Plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this Defendant, and allowed such advances to be used for other purposes, and this Defendant states that the Plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of this Defendant.

18.

That Plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $3,866.20 together with interest thereon at the rate of six per centum per annum from April 17, 1953, until paid be held to have attached as of date of delivery of said materials to the land and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, Padgett Lumber Company, as Cross-complainant, for its Cross-complaint herein alleges that the defendant, Westmoreland Manganese Corporation, is indebted to it in the sum of $3,866.20, together with interest thereon at the rate of 6% per annum from April 17, 1953, until paid, for which it is entitled to a lien as hereinabove set forth. Certified copies of this defendant's Account for Lien being attached to and filed herewith and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant, Westmoreland Manganese Corporation in the sum of Three Thousand Eight Hundred Sixty-six and 20 100 Dollars ($3,866.20), together with interest thereon at the rate of 6% per annum from April 17, 1953, until paid, and prays that said judgment be declared to be a prior, paramount lien upon the following described property:

The Southwest Quarter (SW¼) of the Northwest Quarter (NW¼) and the North Half (N½) of the Southwest Quarter (SW¼), Section Thirty-one (31), Township Fifteen (15) North, Range Six (6) West, Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

WASHER PLANT, and the machinery and equipment therein, consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

PAIGETT LUMBER COMPANY
By J. J. McCaleb and
W. D. Murphy
Its Attorneys

SEPARATE ANSWER AND CROSS-COMPLAINT OF GENERAL STEEL PRODUCTS COMPANY

(Filed in U. S. District Court on February 25, 1954)

This defendant, General Steel Products Company, for its Separate Answer to the Complaint of plaintiff in the above styled action, states:

1.

It admits the allegations of paragraph 1 of the Complaint.

2.

It admits the allegations of paragraph 2 of the Complaint.

3.

It admits the allegations of paragraph 3 of the Complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have the effect alleged by Plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to plaintiff, and denies that there was any such existing indebtedness.

4.

It admits the allegations of paragraph 4 of the Complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit "C" to its Complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate and (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation, and against which the plaintiff now seeks to have its alleged "mortgage" lien claim enforced. That Plaintiff had the right and opportunity to have executed to it mortgages which were definite and

specific as to the particular property to be mortgaged, but neglected and failed to do so. Denies that plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal to or superior to the statutory lien of this defendant.

5.

It admits the allegations of paragraph 5 of the Complaint only as to the execution of the instrument designated as a "Supplemental Mortgage", and referred to as Exhibit "D" to the Complaint, but denies that the same in fact is a valid mortgage, in that it does not grant or convey any real estate, and, (except as to limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant, Westmoreland Manganese Corporation, against which the plaintiff now seeks to have its lien claim enforced, and denies that plaintiff has or is entitled to any lien against any of the property held or owned by the defendant, Westmoreland Manganese Corporation, equal to or superior to the statutory lien of this defendant.

6.

It admits the allegations of paragraph 6 of the Complaint.

7.

It admits the allegations of paragraph 7 of the Complaint.

8.

It admits only the execution of the paper referred to in paragraph 8 of the complaint as "Amendment No. 1 to Letter Order No. GS-OOP(D)-12263", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such Amendment to Letter Order or any other correspondence between the plaintiff, or any of its agencies, and the defendant, Westmoreland Manganese Corporation, in any manner affected the rights of

this defendant to its statutory lien and the superiority thereof.

9.

It admits this defendant's claim of lien as alleged in paragraph 9 of the complaint, but states that the lien claimed by this defendant, General Steel Products Company, in addition to being a mechanic's and/or materialman's lien generally as provided by Sections 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

It is without information upon which to base a denial or an admission of the allegations of paragraph 10 of the Complaint.

11.

It is without information upon which to base a denial or an admission of the allegations of paragraph 11 of the Complaint.

12.

It is without information upon which to base a denial or an admission of the allegations of paragraph 12 of the Complaint.

13.

It is without information upon which to base a denial or an admission of the allegations of paragraph 13 of the Complaint.

14.

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant, Westmoreland Manganese Corporation, and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph 14 of the Complaint, this defendant lacks information to either deny or admit.

15.

Further answering, this defendant General Steel Products Company, a corporation organized and existing under the laws of the State of Missouri, between the 3rd day of January, 1953, and the 4th day of March, 1953, both inclusive, sold and delivered to the defendant Westmoreland Manganese Corporation certain material, same being so sold and delivered upon the direct purchase order given by said Westmoreland Manganese Corporation to this defendant General Steel Products Company as set forth in Exhibit "A" made a part of this defendant's Account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, May 25, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby assenting and preserving its lien for $15,925.62 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon.

This defendant here asserts its said lien in the sum of $15,925.62 together with interest thereon at the rate of six per centum per annum from May 25, 1953, until paid, superior to the claim of lien against any of said properties of Westmoreland Manganese Corporation by the plaintiff or any other defendant herein.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph 2 of plaintiff's Complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant, Westmoreland Manganese Corporation, the sum of $930,751.21, which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00, and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant: That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this Defendant states that the Plaintiff by the terms of its Contract with the Defendant, Westmoreland, which Contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said Defendant, and is jointly liable to this Defendant, General Steel Products Company, to the extent of its commitment to advance funds for the "development, equipment, and preparation of the above-named property (i.e. deposits owned by West-

moreland located near Cushman, Arkansas) for the production of manganese ore"; that the Plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland on that basis and for that purpose and not on the basis of an interest-bearing loan secured by a mortgage, as Plaintiff now by its Complaint attempts to make it appear: That the said transactions as between the plaintiff and the defendant, Westmoreland Manganese Corporation, and as set out in the Complaint, were not in the nature of an interest-bearing loan for moneys loaned by the Plaintiff to Westmoreland, and were not intended as such, but were in truth and in fact moneys advanced by the plaintiff to the defendant, Westmoreland Manganese Corporation, for manganese to be delivered by Westmoreland to the plaintiff in the future and after the plant was in production.

This Defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland properties into production of manganese; that the Plaintiff under paragraph 8 of the original Contract of April 7, 1952, with Westmoreland had the

> "right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation."

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

> "(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.*"

And this Defendant states that the Plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this Defendant, and allowed such advances to be used for other purposes, and this Defendant states that the Plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of this Defendant.

18.

That Plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That

plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $15,925.62 together with interest thereon at the rate of six per centum per annum from May 23, 1953, until paid be held to have attached as of date of delivery of said materials to the land and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, General Steel Products Company, as Cross-complainant, for its Cross-complaint herein alleges that the defendant, Westmoreland Manganese Corporation, is indebted to it in the sum of $15,925.62, together with interest thereon at the rate of 6% per annum from May 23, 1953, until paid, for which it is entitled to a lien as hereinabove set forth. Certified copies of this defendant's Account for Lien being attached to and filed herewith and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant, Westmoreland Manganese Corporation in the sum of $15,925.62 together with interest thereon at the rate of 6% per annum from May 23, 1953, until paid, and prays that said judgment be declared to be a prior, paramount lien upon the following described property:

The Southwest Quarter ($SW\frac{1}{4}$) of the Northwest Quarter ($NW\frac{1}{4}$) and the North Half ($N\frac{1}{2}$)

of the Southwest Quarter (SW¼), Section Thirty-one (31), Township Fifteen (15) North, Range Six (6) West, Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

WASHER PLANT, and the machinery and equipment therein, consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

GENERAL STEEL PRODUCTS COMPANY
By W. D. Murphy
J. J. McCaleb
Its Attorneys

SEPARATE ANSWER AND CROSS-COMPLAINT OF IRA SHERRILL

(Filed in U. S. District Court on February 25, 1954)

This defendant, Ira Sherill, for his Separate Answer to the complaint of plaintiff in the above styled action, states:

1.

He admits the allegations of paragraph 1 of the complaint.

2.

He admits the allegations of paragraph 2 of the complaint.

3.

He admits the allegations of paragraph 3 of the complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have, the effect alleged by plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by defendant Westmoreland Manganese Corporation to plaintiff, and denies that there was any such existing indebtedness.

4.

He admits the allegation of paragraph 4 of the complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit C to its complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation and against which plaintiff now seeks to have its lien claim enforced. That plaintiff had the right and opportunity to have executed to it mortgages which were definite and specific as to the particular property to be mortgaged, but neglected and failed to do so. Denies that plaintiff has or is entitled to any lien against

any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

5.

He admits the allegations of paragraph 5 of the complaint only as to the execution of the instrument designated as a "supplemental Mortgage" and referred to as Exhibit D to the complaint, but denies that same in fact is a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant Westmoreland Manganese Corporation against which the plaintiff now seeks to have its lien claim enforced. Denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

6.

He admits the allegations of paragraph 6 of the complaint.

7.

He admits the allegations of paragraph 7 of the complaint.

8.

He admits only the execution of the paper referred to in paragraph 8 of the complaint as "Amendment No. 1 to Letter Order GS-00P(D)-12263", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such "Amendment to Letter Order", or any other correspondence between the plaintiff or any of its agencies and the defendant Westmoreland Manganese Corporation in any manner affected the rights of this defendant to its statutory lien and the superiority thereof.

9.

He admits this defendant's claim of lien as alleged in paragraph 9 of the complaint, but states that the lien

claimed by this defendant, Ira Sherrill in addition to being a mechanic's and or materialman's lien generally as provided by 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947 Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated. This defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

That this defendant lacks information to either deny or admit the allegations of paragraph 10 of the complaint.

11.

This this defendant lacks information to either deny or admit the allegations of paragraph 11 of the complaint.

12.

That this defendant lacks information to either deny or admit the allegations of paragraph 12 of the complaint.

13.

That this defendant lacks information to either deny or admit the allegations of paragraph 13 of the complaint.

14.

He admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant Westmoreland Manganese Corporation and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph 14 of the complaint this defendant lacks information to either deny or admit.

15.

Further answering, this defendant Ira Sherrill, between the 9th day of December, 1952, and the 22nd day of January, 1953, both inclusive, furnished and delivered to the defendant Westmoreland Manganese Corporation cer-

tain labor and material, same being so performed, sold and delivered upon the direct purchase order given by said Westmoreland Manganese Corporation to this defendant Ira Sherrill as set forth in Exhibit "A" made a part of this defendant's Account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, May 25, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby asserting and preserving his lien for $362.50 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon.

This defendant here asserts its said lien in the sum of $362.50 together with interest thereon at the rate of six per centum per annum from January 22, 1953, until paid, superior to the claim of lien against any of said properties of Westmoreland Manganese Corporation by the plaintiff.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph 2 of plaintiff's complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant Westmoreland Manganese Corporation the sum of $30,751.21 which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00

and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this defendant states that the plaintiff by the terms of its Contract with the Defendant, Westmoreland Manganese Corporation, which contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said defendant, and is jointly liable to this defendant, Ira Sherrill, to the extent of its commitment to advance funds for the "development, equipments, and preparation of the above-named property (i.e. deposits owned by Westmoreland Manganese Corporation located near Cushman, Arkansas) for the production of manganese ore"; that the plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland Manganese Corporation on that basis and for that purpose and not on the basis of an interest bearing loan secured by a mortgage, as plaintiff now by its complaint attempts to make it appear.

This defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland Manganese Corporation properties into production of manganese; that the Plaintiff under paragraph 8(c) of the original Contract of April 7, 1952, with Westmoreland Manganese Corporation had the

> "right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation".

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein.* Such mortgages are to be in the form and of the substances prescribed or approved by the Government."

And this defendant states that the plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this defendant, and allowed such advances to be used for other purposes, and this defendant states that the plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of the defendant.

18.

That plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of

$100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $362.50 together with interest thereon at the rate of six per centum per annum from January 22, 1953, until paid be held to have attached as of date of delivery of said materials to the land, and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, Ira Sherrill, as Cross-complainant, for his cross-complaint herein alleges that the defendant Westmoreland Manganese Corporation is indebted to it in the sum of $362.50 together with interest thereon at the rate of six per centum per annum from January 22, 1953, until paid, and for which he is entitled to liens as herein above set forth. Certified copy of this defendant's Account for Lien being attached to and filed herewith and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant Westmoreland Manganese Corporation in the sum of $362.50 together

with interest thereon at the rate of six per centum per annum from January 22, 1953, until paid, and prays that said judgment be declared to be a prior and paramount lien upon the following described property:

The Southwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of Section 31, Township 15 North, Range 6 West in Independence County, Arkansas, together with all other lands and mineral titles ~~to lands~~ as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 30 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to the payment of this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

Ira Sherrill

s W. D. Murphy

s By J. J. McCaleb

Its Attorneys

SEPARATE ANSWER AND CROSS-COMPLAINT OF CHOCTAW, INC.

(Filed in U. S. District Court on February 25, 1954)

This defendant, Choctaw, Inc., for his Separate Answer to the complaint of plaintiff in the above styled action, states: It is a corporation existing under the laws of the State of Tennessee.

1.

It admits the allegations of paragraph 1 of the complaint.

2.

It admits the allegations of paragraph 2 of the complaint.

3.

It admits the allegations of paragraph 3 of the complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have, the effect alleged by plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by defendant Westmoreland Manganese Corporation to plaintiff, and denies that there was any such existing indebtedness.

4.

It admits the allegation of paragraph 4 of the complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit C to its complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation and against which plaintiff now seeks to have its lien claim enforced. That plaintiff had the right and opportunity to have executed to it mortgages which were definite and specific as to the particular property to be mortgaged, but neglected and failed to do so. Denies that plaintiff has or is entitled to any lien against

any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

5.

It admits the allegations of paragraph 5 of the complaint only as to the execution of the instrument designated as a "supplemental Mortgage" and referred to as Exhibit D to the complaint, but denies that same in fact is a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant Westmoreland Manganese Corporation against which the plaintiff now seeks to have its lien claim enforced. Denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

6.

It admits the allegations of paragraph 6 of the complaint.

7.

It admits the allegations of paragraph 7 of the complaint.

8.

It admits only the execution of the paper referred to in paragraph 8 of the complaint as "Amendment No. 1 to Letter Order GS-OOP(D)-12263", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such "Amendment to Letter Order", or any other correspondence between the plaintiff or any of its agencies and the defendant Westmoreland Manganese Corporation in any manner affected the rights of this defendant to its statutory lien and the superiority thereof.

9.

It admits this defendant's claim of lien as alleged in paragraph 9 of the complaint, but states that the lien

claimed by this defendant, Choctaw, Inc., in addition to being a mechanic's and/or materialman's lien generally as provided by 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947 Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated. This defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

That this defendant lacks information to either deny or admit the allegations of paragraph 10 of the complaint.

11.

This this defendant lacks information to either deny or admit the allegations of paragraph 11 of the complaint.

12.

That this defendant lacks information to either deny or admit the allegations of paragraph 12 of the complaint.

13.

That this defendant lacks information to either deny or admit the allegations of paragraph 13 of the complaint.

14.

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant Westmoreland Manganese Corporation and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph 14 of the complaint this defendant lacks information to either deny or admit.

15.

Further answering, this defendant Choctaw, Inc., between the 2nd day of January, 1953, and the 5th day of February, 1953, both inclusive, furnished and delivered to the defendant Westmoreland Manganese Corporation cer-

tain labor and material, same being so performed, sold and delivered upon the direct purchase order given by said Westmoreland Manganese Corporation to this defendant Choctaw, Inc., as set forth in Exhibit "A" made a part of this defendant's Account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, May 25, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby asserting and preserving his lien for $3,086.29 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon.

This defendant here asserts its said lien in the sum of $3,086.29 together with interest thereon at the rate of six per centum per annum from February 5, 1953, until paid, superior to the claim of lien against any of said properties of Westmoreland Manganese Corporation by the plaintiff.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph 2 of plaintiff's complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant Westmoreland Manganese Corporation the sum of $930,751.21 which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00

and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this defendant states that the plaintiff by the terms of its Contract with the Defendant, Westmoreland Manganese Corporation, which contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said defendant, and is jointly liable to this defendant, Choctaw, Inc., to the extent of its commitment to advance funds for the "development, equipments, and preparation of the above-named property (i.e. deposits owned by Westmoreland Manganese Corporation located near Cushman; Arkansas) for the production of manganese ore"; that the plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland Manganese Corporation on that basis and for that purpose and not on the basis of an interest bearing loan secured by a mortgage, as plaintiff now by its complaint attempts to make it appear.

This defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland Manganese Corporation properties into production of manganese; that the Plaintiff under paragraph 8(c) of the original Contract of April 7, 1952, with Westmoreland Manganese Corporation had the

> "right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation".

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein.* Such mortgages are to be in the form and of the substances prescribed or approved by the Government."

And this defendant states that the plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this defendant, and allowed such advances to be used for other purposes, and this defendant states that the plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of the defendant.

18.

That plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of

$100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $3,086.29, together with interest thereon at the rate of six per centum per annum from February 5, 1953, until paid be held to have attached as of date of delivery of said materials to the land and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, Choctaw, Inc., as Cross-complainant for its cross-complaint herein alleges that the defendant Westmoreland Manganese Corporation is indebted to it in the sum of $3,086.29 together with interest thereon at the rate of six per centum per annum from February 5, 1953, until paid, and for which he is entitled to liens as hereinabove set forth. Certified copy of this defendant's Account for Lien being attached to and filed herewith and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant Westmoreland Manganese Corporation in the sum of $3,086.29 together

with interest thereon at the rate of six per centum per annum from February 5, 1952 until paid, and prays that said judgment be declared to be a prior and paramount lien upon the following described property:

The Southwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of Section 31, Township 15 North, Range 6 West in Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low-head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8-D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to the payment of this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

Choctaw, Ixcy

/s/ By J. J. McCaleb

/s/ W. D. Murphy

Its Attorneys

SEPARATE ANSWER AND CROSS-COMPLAINT OF JEFFERY LUMBER COMPANY

(Filed in U. S. District Court on February 25, 1954)

This defendant, Jeffery Lumber Company, for its Separate Answer to the complaint of plaintiff in the above styled action, states: It is a corporation organized and existing under the laws of the State of Arkansas.

1.

It admits the allegations of paragraph 1 of the complaint.

2.

It admits the allegations of paragraph 2 of the complaint.

3.

It admits the allegations of paragraph 3 of the complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have, the effect alleged by plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by defendant Westmoreland Manganese Corporation to plaintiff, and denies that there was any such existing indebtedness.

4.

It admits the allegation of paragraph 4 of the complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit C to its complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation and against which plaintiff now seeks to have its lien claim enforced. That plaintiff had the right and opportunity to have executed to it mortgages which were definite and specific as to the particular property to be mortgaged, but neglected and failed to do so. Denies that plaintiff has or is entitled to any lien against

any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

5.

It admits the allegations of paragraph 5 of the complaint only as to the execution of the instrument designated as a "supplemental Mortgage" and referred to as Exhibit D to the complaint, but denies that same in fact is a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by the defendant Westmoreland Manganese Corporation against which the plaintiff now seeks to have its lien claim enforced. Denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

6.

It admits the allegations of paragraph 6 of the complaint.

7.

It admits the allegations of paragraph 7 of the complaint.

8.

It admits only the execution of the paper referred to in paragraph 8 of the complaint as "Amendment No. 1 to Letter Order GS-OOP(D)-12263", but denies that it had or was intended to have the effect alleged by the plaintiff; denies that such "Amendment to Letter Order", or any other correspondence between the plaintiff or any of its agencies and the defendant Westmoreland Manganese Corporation in any manner affected the rights of this defendant to its statutory lien and the superiority thereof.

9.

It admits this defendant's claim of lien as alleged in paragraph 9 of the complaint, but states that the lien

claimed by this defendant, Jeffery Lumber Co., in addition to being a mechanic's and or materialman's lien generally as provided by 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947 Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated. This defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

That this defendant lacks information to either deny or admit the allegations of paragraph 10 of the complaint.

11.

This this defendant lacks information to either deny or admit the allegations of paragraph 11 of the complaint.

12.

That this defendant lacks information to either deny or admit the allegations of paragraph 12 of the complaint.

13.

That this defendant lacks information to either deny or admit the allegations of paragraph 13 of the complaint.

14.

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant Westmoreland Manganese Corporation and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph 14 of the complaint this defendant lacks information to either deny or admit.

15.

Further answering, this defendant Jeffery Lumber Co., between the 3rd day of December, 1952, and the 9th day of February, 1953, both inclusive, furnished and delivered to the defendant Westmoreland Manganese Corporation cer-

tain labor and material, same being so performed, sold and delivered upon the direct purchase order given by said Westmoreland Manganese Corporation to this defendant Jeffery Lumber Co., as set forth in Exhibit "A" made a part of this defendant's Account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, May 25, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby asserting and preserving its lien for $2,157.55 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon.

This defendant here asserts its said lien in the sum of $2,157.55 together with interest thereon at the rate of six per centum per annum from February 9, 1953, until paid, superior to the claim of lien against any of said properties of Westmoreland Manganese Corporation by the plaintiff.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph 2 of plaintiff's complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to the defendant Westmoreland Manganese Corporation the sum of $30,751.21 which the plaintiff had by the terms of said contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00

and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this defendant states that the plaintiff by the terms of its Contract with the Defendant, Westmoreland Manganese Corporation, which contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said defendant, and is jointly liable to this defendant, Jeffery Lumber Co., to the extent of its commitment to advance funds for the "development, equipments, and preparation of the above-named property (i.e. deposits owned by Westmoreland Manganese Corporation located near Cushman, Arkansas) for the production of manganese ore"; that the plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland Manganese Corporation on that basis and for that purpose and not on the basis of an interest bearing loan secured by a mortgage, as plaintiff now by its complaint attempts to make it appear.

This defendant states that the plaintiff exercised control over the construction program and the purchase and payment of material and supplies for putting the Westmoreland Manganese Corporation properties into production of manganese; that the Plaintiff under paragraph 8(c) of the original Contract of April 7, 1952, with Westmoreland Manganese Corporation had the

> "right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation".

And under paragraphs 5(a) (b) and (c) of the said contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein.* Such mortgages are to be in the form and of the substances prescribed or approved by the Government."

And this defendant states that the plaintiff failed in its duty to see that moneys advanced by it against manganese to be produced were used to pay for material and supplies furnished by this defendant, and allowed such advances to be used for other purposes, and this defendant states that the plaintiff is estopped to assert a lien by virtue of its alleged mortgage as being superior to the lien of the defendant.

18.

That plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of

$100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $2,157.55 together with interest thereon at the rate of six per centum per annum from February 9, 1953 until paid be held to have attached as of date of delivery of said materials to the land and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, Jeffery Lumber Company, as Cross-complainant, for its cross-complaint herein alleges that the defendant Westmoreland Manganese Corporation is indebted to it in the sum of $2,157.55 together with interest thereon at the rate of six per centum per annum from February 9, 1953, until paid, and for which he is entitled to liens as hereinabove set forth. Certified copy of this defendant's Account for Lien being attached to and filed herewith and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant Westmoreland Manganese Corporation in the sum of $2,157.55 together

with interest thereon at the rate of six per centum per annum from February 9, 1953, until paid, and prays that said judgment be declared to be a prior and paramount lien upon the following described property:

The Southwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of Section 31, Township 15 North, Range 6 West in Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

Washer Plant, and the machinery and equipment therein consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie scraper, two Caterpillar S D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to the payment of this judgment; for its costs, and any and all other relief to which it may appear to be entitled.

Jeffery Lumber Company

s W. D. Murphy

s By J. J. McCalgh

Its Attorneys

SEPARATE ANSWER AND CROSS-COMPLAINT OF BRAGG'S ELECTRIC CONSTRUCTION COMPANY

(Filed in U. S. District Court on February 26, 1954)

The defendant, Bragg's Electric Construction Company, for its Separate Answer to the Complaint, states:

I

This defendant admits the allegations of paragraph I of the Complaint.

II

This defendant admits the allegations of paragraph II of the Complaint.

III

This defendant admits the execution of the "Mortgage Note" mentioned in paragraph III of the Complaint, but denies that the indebtedness evidenced by such "Mortgage Note" ever existed as a valid debt owing by the defendant, Westmoreland Manganese Corporation, to the plaintiff.

IV

This defendant admits the execution of the "Real Estate and Chattel Mortgage" mentioned in paragraph IV of the Complaint, but denies that such mortgage was, in fact and in law, a valid conveyance or mortgage on the property owned by the defendant, Westmoreland Manganese Corporation; and specifically this defendant denies that such mortgage created any lien against any of the property held or owned by Westmoreland Manganese Corporation, which lien is equal or prior to the statutory lien of this defendant.

V

This defendant admits the execution of the "Supplemental Mortgage" mentioned in paragraph V of the Complaint, but denies that such instrument is a valid mortgage, and specifically denies that such instrument created any mortgage lien which would take priority over the lien of

any mechanic, materialman, laborer, or any other statutory lien, and further specifically denies that such instrument created any lien on any of the property of the defendant, Westmoreland Manganese Corporation, which lien is equal or prior to the statutory lien of this defendant.

VI

This defendant admits the allegations of paragraph VI of the Complaint.

VII

This defendant admits the allegations of paragraph VII of the Complaint.

VIII

This defendant admits the execution of the agreement entitled "Amendment No. 1 to Letter Order No. GS-00P(D)-12263" but denies that after the execution thereof plaintiff made advances of money to defendant, Westmoreland Manganese Corporation, and specifically denies that the execution of said agreement in any manner affected the rights of this defendant to its statutory lien, or the priority thereof; and this defendant further specifically states that such agreement is void and of no force and effect insofar as it attempts to effect the validity and superiority of the statutory lien of this defendant.

IX

This defendant admits, as alleged in paragraph IX(a), that it filed a statutory lien against certain properties of the defendant, Westmoreland Manganese Corporation, as said properties are more specifically hereinafter described, in the amount of $15,780.13, but denies that its rights under such statutory lien are subsequent, inferior or subordinate to the rights of the plaintiff, and specifically this defendant states that its said statutory lien is prior, paramount and superior to plaintiff's claim of lien. This defendant does not have sufficient information upon which to base a denial or admission as to the remainder of the allegations of paragraph IX of the Complaint.

X

This defendant does not have sufficient information upon which to base a denial or admission of the allegations in paragraph X of the Complaint.

XI

This defendant does not have sufficient information upon which to base a denial or admission of the allegations in paragraph XI of the Complaint.

XII

This defendant does not have sufficient information upon which to base a denial or admission of the allegations in paragraph XII of the Complaint.

XIII

This defendant does not have sufficient information upon which to base a denial or admission of the allegations in paragraph XIII of the Complaint.

XIV

This defendant does not have sufficient information either to deny or admit the allegations of paragraph XIV of the Complaint.

XV

Further answering, this defendant states that the mortgages which plaintiff now seeks to foreclose were executed as part of the consideration for the contract, designated Exhibit "A" to the Complaint, between the plaintiff and defendant, Westmoreland Manganese Corporation, and that plaintiff has breached the terms thereof and refused to advance the funds as provided in said contract; and that by the failure of the plaintiff to perform the covenants and agreements contained in said contract with Westmoreland Manganese Corporation plaintiff's mortgage became inoperative and of no force and effect.

XVI

Further answering, this defendant states that by irtue of the agreements between plaintiff and defendant, Westmoreland Manganese Corporation, and particularly y paragraph 5 of the agreement designated Exhibit "A" o the Complaint, plaintiff, for the benefit of this defend- nt, contracted to advance sums to pay for the cost of quipping the new facilities for the mining, production nd processing of manganese ore; and that a written re- uest for an advance sufficient to pay the indebtedness ff prior to its termination of such agreement, and defend- ff prior to its termination of such agreement ,and defend- nt's rights, as a beneficiary of such contract, are superior plaintiff's rights under its alleged mortgages, and plain- ff can not now assert any rights superior to this defend- nt's statutory lien foreclosure of which is sought in this efendant's Cross-complaint.

XVII

Further answering, this defendant states that on sev- ral occasions the duly authorized representatives of plain- ff assured this defendant that plaintiff had segregated om the general funds owing to defendant, Westmoreland anganese Corporation, under the Mortgage Note afore- id, an amount sufficient to pay directly to this defendant r all electrical work and supplies furnished by this de- ndant to Westmoreland Manganese Corporation, and that xcept for such express representations and assurances is defendant would have terminated its contract with the efendant, Westmoreland Manganese Corporation; but- lying upon such express representations by plaintiff at plaintiff would make direct payment for all such work, bor and materials, this defendant continued the perform- nce of its contract for installation of electrical facilities the new plant of the defendant, Westmoreland Mangan- se Corporation, and plaintiff is now estopped to claim y lien superior to the statutory lien of this defendant.

Wherefore, this defendant prays that the mortgage ought to be foreclosed in this action by plaintiff be de- ared to be invalid and inoperative, or alternatively that

said mortgage be adjudged second, subordinate and inferior to the statutory lien of this defendant, or alternatively that the plaintiff be adjudged to be estopped to assert any lien by virtue of such mortgage which would be superior to the statutory lien of this defendant.

CROSS-COMPLAINT

The defendant, Bragg's Electric Construction Company, as Cross-complainant, for its cause of action against the defendant, Westmoreland Manganese Corporation, alleges:

I

That on October 1, 1952, defendant, Westmoreland Manganese Corporation (a corporation under the laws of the State of Maryland) and Bragg's Electric Construction Company (a corporation under the laws of the State of Arkansas) entered into a contract whereby Cross-complainant agreed to furnish labor, supervision and materials for the installation of electrical equipment in connection with the construction by defendant, Westmoreland Manganese Corporation, of a manganese plant, which construction and improvements are designated and known as the Washer Building, Dutch Cyclone and Heavy Media Building, Pump House, Cafe, and Multi-Quonset Building, and this Cross-complainant also furnished and installed a Pole Line and Transformer Bank used in connection with the construction of the aforesaid manganese plant, all of such improvements, construction and electrical installations being now located upon the following described land in Independence County, Arkansas, to-wit:

> The Southwest Quarter (SW^1_4) of the Northwest Quarter (NW^1_4) and the North Half (N^1_2) of the Southwest Quarter (SW^1_4) of Section 31, Township 15 North, Range 6 West;

II

That under and pursuant to the terms of said contract, Cross-complainant did furnish to said defendant, West-

moreland Manganese Corporation, labor, materials, electrical equipment and supplies used in the construction of the aforesaid improvements, and are now incorporated in and constitute a part of such improvements located upon the above described lands.

III

That such labor and materials aforesaid were furnished in the total amount of Sixty-nine Thousand Nine Hundred One and 72/100 Dollars ($69,901.72), and that there has been paid toward the satisfaction thereof only the sum of Fifty-four Thousand Two Hundred One and 59/100 Dollars ($54,201.59), leaving a balance thereof now due and owing by said defendant to Cross-complainant in the sum of Fifteen Thousand Seven Hundred and 13/100 Dollars ($15,700.13), together with interest thereon at the rate of six per cent (6%) per annum from June 2, 1953, until paid.

IV

That on June 2, 1953, Cross-complainant duly filed with the Circuit Clerk and Ex-Officio Recorder of Independence County, Arkansas, its verified account and affidavit for lien, and said lien is now of record therein in Book "B", under "W". A copy of said lien and account is attached hereto, marked Exhibit "A", and made a part hereof. That the aforesaid lien, in addition to being a mechanic's and materialmen's lien, as provided by Arkansas Statutes (1947) Sections 51-601 to 51-631, is also a mechanic's and materialman's lien under and by virtue of the provisions of Arkansas Statutes (1947) Sections 51-701 to 51-714, inclusive. That said statutory lien is a prior, paramount and superior lien upon the property above described and the improvements located thereon, and that default has been made in the payment thereof.

Wherefore, this defendant, as Cross-complainant, prays that it do have and recover judgment against the defendant, Westmoreland Manganese Corporation, in the sum of Fifteen Thousand Seven Hundred and 13/100 Dollars ($15,700.13), together with interest thereon at the rate of six per cent (6%) per annum from June 2, 1953, until paid, and that such judgment be decreed a prior, paramount and superior lien upon the above described property and the improvements thereon, and if not paid within a time to be fixed by this Court that said property and improvements be sold, and that the proceeds of such sale be applied, first, to the payment of the aforesaid judgment, and that the balance be deposited in the registry of this Court pending the final orders of the Court as to the relative rights of the other parties to this action.

Cross-complaint further prays for its costs herein expended, and for any and all other relief to which it may appear to be entitled.

Bragg's Electric Construction Company

By Catlett & Henderson

By /s/ E. DeMatt Henderson

Attorneys for Defendant

727 Pyramid Life Building

Little Rock, Arkansas

SEPARATE ANSWER AND CROSS-COMPLAINT OF LATROBE CONSTRUCTION COMPANY

(Filed in U. S. District Court on March 3, 1954)

This defendant, Latrobe Construction Company, for its Separate Answer to the complaint of plaintiff in the above styled action, states:

1.

It admits the allegations of paragraph 1 of the complaint.

2.

It admits the allegations of paragraph 2 of the complaint.

3.

It admits the allegations of paragraph 3 of the complaint, only as to the execution of the alleged "mortgage note", but denies that said instrument had, or was intended to have, the effect alleged by plaintiff; denies that it evidenced any valid subsisting indebtedness then owing by defendant Westmoreland Manganese Corporation to plaintiff, and denies that there was any such existing indebtedness.

4.

It admits the allegation of paragraph 4 of the complaint only as to the execution of the alleged "mortgage", but denies that said instrument referred to by plaintiff as Exhibit C to its complaint herein as a "mortgage" is in fact a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property or sufficiently describe the greater portion of the personal property held by Westmoreland Manganese Corporation and against which plaintiff now seeks to have its lien claim enforced. That plaintiff had the right and opportunity to have executed to it mortgages which were definite and specific as to the particular property to be mortgaged, but neglected and failed to do so. Denies that plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Man

ganese Corporation equal or superior to the statutory lien of this defendant.

5.

It admits the allegations of paragraph 5 of the complaint only as to the execution of the instrument designated as a "supplemental Mortgage" and referred to as Exhibit D to the complaint, but denies that same in fact is a valid mortgage in that it does not grant or convey any real estate, and, (except as to the limited items of personalty specifically designated) does not grant or convey any personal property, or sufficiently describe the greater portion of the personal property held by the defendant Westmoreland Manganese Corporation against which the plaintiff now seeks to have its lien claim enforced. Denies that the plaintiff has or is entitled to any lien against any of the property held or owned by Westmoreland Manganese Corporation equal or superior to the statutory lien of this defendant.

6.

It admits the allegations of paragraph 6 of the complaint.

7.

It admits the allegations of paragraph 7 of the complaint.

8.

It admits only the execution of the paper referred to in paragraph 8 of the complaint as "Amendment No. 1 to Letter Order GS 00P(D)-1226", but denies that it had or was intended to have the effect alleged by the plaintiff, denies that such "Amendment to Letter Order", or any other correspondence between the plaintiff or any of its agencies and the defendant Westmoreland Manganese Corporation in any manner affected the rights of this defendant to its statutory lien and the superiority thereof.

9.

It admits this defendant's claim of lien as alleged in paragraph 9 of the complaint, but states that the lien claimed by this defendant, Latrobe Construction Company

In addition to being a mechanic's and or materialman's lien generally as provided by 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947 Annotated, is also a "Miner's Lien" as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated. This defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source.

10.

That this defendant lacks information to either deny or admit the allegations of paragraph 10 of the complaint.

11.

That this defendant lacks information to either deny or admit the allegations of paragraph 11 of the complaint.

12.

That this defendant lacks information to either deny or admit the allegations of paragraph 12 of the complaint.

13.

That this defendant lacks information to either deny or admit the allegations of paragraph 13 of the complaint.

14.

It admits that it would be necessary for the plaintiff to have an inventory of the properties of the defendant Westmoreland Manganese Corporation and to be informed as to what property it should claim a lien against; that as to the other allegations contained in paragraph 14 of the complaint this defendant lacks information to either deny or admit.

15.

Further answering, this defendant Latrobe Construction Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, between September 22, 1952, and February 26, 1953, both inclusive,

sold and delivered material to and performed labor for defendant Westmoreland Manganese Corporation under a written contract dated October 13, 1952, as mentioned in this defendant's account of Materialman's Lien duly filed with the Clerk of the Circuit Court of Independence County, Arkansas, May 9, 1953, pursuant to Sections 51,601 to 51,631, both inclusive, and Sections 51.701 to 51,714, both inclusive, of Arkansas Statutes of 1947 Annotated, thereby asserting and preserving its lien for $314,471.33 and interest against all of the properties of Westmoreland Manganese Corporation situated in Independence County, Arkansas, including all the lands and mineral titles to lands set forth in plaintiff's complaint and all improvements, machinery and equipment thereon. Said contract of October 13, 1952, between this defendant and defendant Westmoreland Manganese Corporation with addenda thereto having been duly filed for record with the Clerk & Recorder of Independence County, Arkansas, and certified copy thereof is filed herewith as Exhibit "B" hereto.

This defendant here asserts its said liens in the sum of $314,471.33 together with interest thereon at the rate of six per cent per annum from May 9, 1953, until paid, superior to the claim of lien against any properties of defendant Westmoreland Manganese Corporation by the plaintiff.

16.

Further answering, this defendant alleges and shows to the Court that the purported "Mortgages" under which plaintiff now claims was merely incidental to and conditioned altogether upon the full and final performance by the plaintiff of all covenants and agreements contained in the contract referred to in paragraph 2 of plaintiff's complaint herein; that the same are not severable, and that a partial performance by the plaintiff does not entitle it to the relief here sought.

And this defendant now alleges that the plaintiff failed and refused to pay over or make available to this defendant Westmoreland Manganese Corporation the sum of $630,751.33 which the plaintiff had by the terms of said

contract agreed to pay over and make available to Westmoreland Manganese Corporation, and thus breached said contract. That the moving consideration for the execution of said contract and said alleged mortgages incidental thereto was the payment of the entire sum of $3,807,250.00 and upon failure of such consideration said contract became void and the alleged mortgages incidental thereto inoperative and of no effect. That by such failure of the plaintiff the covenants and agreements of Westmoreland Manganese Corporation were rendered impossible of performance, resulting in its inability to pay for the materials purchased from this defendant. That it would be inequitable to allow plaintiff to claim a lien superior to this defendant and that plaintiff should be held estopped from so doing.

17.

And further answering, this defendant states that the plaintiff by the terms of its Contract with the Defendant, Westmoreland Manganese Corporation, which contract is implemented by the Mortgages here sought to be foreclosed, was and is engaged in a joint enterprise with the said defendant, and is jointly liable to this defendant, Latrobe Construction Company, to the extent of its commitment to advance funds for the "development, equipments, and preparation of the above-named property (i.e., deposits owned by Westmoreland Manganese Corporation located near Cushman, Arkansas) for the production of manganese ore"; that the plaintiff was vitally interested in the production and stockpiling of manganese and entered into the Contract with Westmoreland Manganese Corporation on that basis and for that purpose and not on the basis of an interest bearing loan secured by a mortgage, as plaintiff now by its complaint attempts to make it appear.

This defendant states that the plaintiff exercised control over the construction program and the purchases and payment of material and supplies for putting the Westmoreland Manganese Corporation properties into production of manganese; that the Plaintiff under paragraph [illegible] of the original Contract of April 7, [illegible] Westmoreland Manganese Corporation had the

"right to maintain one or more representatives at the site of the work, to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation".

And under paragraphs 5(a) (b) and (c) of the said Contract it was provided as follows:

"(a) You shall maintain a separate bank account or accounts, in a bank or banks to be approved by the Government, into which the advances made by the Government shall be deposited. You will not commingle such funds advanced by the Government with any other funds. Withdrawals will require counter-signature of an authorized agent of the Government.

"(b) Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

"(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, *which will be fully paid for through the advance of funds by the Government as prescribed herein.* Such mortgages are to be in the form and of the substances prescribed or approved by the Government."

And this defendant states that the plaintiff failed in its duty to see that moneys advanced by it against mortgages to be produced were used to pay for material and supplies furnished by this defendant, and allowed such advances to be used for other purposes, and this defendant states that the plaintiff is estopped to assert a lien by virtue of its alleged mortgages being subsequent to the lien of the defendant.

18.

That plaintiff had available to it the information as to purchase of materials and allowed Westmoreland Manganese Corporation to purchase same. That in excess of $100,000.00 of funds advanced by plaintiff for purchase of materials was by plaintiff arbitrarily withdrawn after the materials purchased from this defendant had been delivered. That plaintiff should be required to replace said funds so withdrawn and payment therefrom made to this defendant.

This defendant alleges that it knew and relied upon the fact that plaintiff was advancing the funds to pay for materials which it sold and delivered to Westmoreland Manganese Corporation, and that plaintiff's agent and representatives encouraged such sale and delivery. That plaintiff should now be held estopped to deny liability for such purchases of materials, or to here attempt to assert a lien superior to that of this defendant.

Wherefore, this defendant prays that its lien in the amount of $314,471.33 together with interest thereon at the rate of six per centum per annum from May 9, 1953, until paid be held to have attached as of date of delivery of said materials to the land and mineral titles to land and to the machinery, materials, supplies and specific improvements upon the lands and mineral titles to lands of Westmoreland Manganese Corporation set forth in plaintiff's alleged mortgages, in preference to any lien or claim of lien of the plaintiff.

19.

CROSS-COMPLAINT

This defendant, Latrobe Construction Company, as cross-complainant, for its cross-complaint herein alleges that the defendant Westmoreland Manganese Corporation is indebted to it in the sum of $314,471.33 together with interest thereon at the rate of six per centum per annum from May 9, 1953, until paid, and for which it is entitled to liens as hereinabove set forth. Certified copy of this defendant's account for [illegible] attached to and [illegible] and made a part hereof as Exhibit "A" to this Cross-complaint.

Wherefore, this defendant and cross-complainant prays for judgment against the defendant Westmoreland Manganese Corporation in the sum of $314,471.33 together with interest thereon at the rate of six per centum per annum from May 9, 1953, until paid, and prays that said judgment be declared to be a prior and paramount lien upon the following described property:

The Southwest Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of Section 31, Township 15 North, Range 6 West in Independence County, Arkansas, together with all other lands and mineral titles to lands as specifically described in plaintiff's complaint and its alleged mortgages, together with all buildings, structures, erections, machinery, materials, supplies and specific improvements, including (but not confined to) the following:

WASHER PLANT, and the machinery and equipment therein consisting (among other items) of four Eagle Log Washers, four McLanahan & Stone log washers, two McLanahan & Stone Rockmaster crushers, four water strainers, six double-deck low head screens, two double-deck Vibrex screens, one single deck heavy duty scalper, Howe 50 ton scales, seven pumps, four drum controllers, motors, starters and electric assemblies.

Other machinery, appliances and equipment including (but not confined to) the following: One Bucyrus-Erie Scraper, two Caterpillar 8 D Tractor Dozers, 2 Manitowoc Shovels, one Adams Motor Grader, and one Caterpillar Ripper.

That if such judgment is not paid within a time fixed by this Court that all the property against which this defendant herein asserts its lien be sold and the proceeds from the sale applied to the payment of this judgment, for its costs, and any and all other relief to which it may appear to be entitled.

LATIMORE CONSTRUCTION COMPANY

By W. D. Murphy

J. J. McCaleb

Its Attorneys

AMENDMENT TO COMPLAINT

(Filed in U. S. District Court on June 21, 1954)

Comes the United States of America by Osro Cobb, United States Attorney for the Eastern District of Arkansas, prior to the time of filing of a responsive pleading by the defendant, Westmoreland Manganese Corporation, and amends Paragraph VIII of its original Complaint filed herein on January 8, 1954, to read as follows:

VIII

Article 5(b) of the original Letter Contract GS-00P(D)-12263, executed on April 7, 1952, and heretofore referred to in Paragraph II of this Complaint, provides:

> Each request for an advance shall be supported by a cash flow sheet showing your requirements for funds to be advanced. As the installation of the facilities progresses, you will also furnish a monthly statement of cumulative costs in such detail as is acceptable to the Government until such facilities are completed and the equipment is purchased.

Pursuant to this provision of the said original Letter Contract, a meeting was held in April 1952 between the representatives of the plaintiff and the representatives of the defendant, Westmoreland Manganese Corporation, to establish record and accounting procedures acceptable to the plaintiff. The plaintiff's requirements as to procedure, which were agreed to by the said defendant, called upon Westmoreland Manganese Corporation, prior to any advance under the contract, to submit an original Cash Flow Sheet, showing the estimated cost of each major component of the contemplated construction work and also the amount estimated as being required for each component for each month of the anticipated construction, totaled to show the estimated cost of the entire project, which should not exceed the amount which the plaintiff had agreed to advance, to-wit, $3,807,250.00, and which should conform as nearly as possible to the detailed cost estimates submitted by the defendant, Westmoreland Manganese Corporation, during

negotiations prior to the execution of the original Letter Contract, it being the understanding of the parties that the said Westmoreland Manganese Corporation was committing itself to build the project for a total cost not to exceed the amounts to be advanced by the plaintiff. The original flow sheet of estimated costs was prepared on April 11, 1952. On its face, it showed that it was contemplated by the parties that the construction program would be completed by January 1, 1953, and that the operation of the washing plant should begin by that date. A counter-signature system was also established, which required the Dallas, Texas, Comptroller of the General Services Administration to sign checks drawn against advances, but the sole function of the Dallas Comptroller in this respect was to assure itself that each voucher and check was legitimately charged to one of the components shown on the flow sheet and that the total of such checks against any one component did not exceed the total amount authorized and estimated therefor. It was also agreed between the parties that each request for an advance subsequent to the original request was to be submitted on a cash flow sheet similar to the original Cash Flow Sheet mentioned above, but containing in addition thereto the following information:

a. Amount expended during previous period.

b. Total amount expended to end of previous period.

c. Unexpended balance at end of previous period.

d. Requirements for next succeeding period and for all other periods until the end of construction term.

e. Total requirements for each category or component.

f. Detailed explanation of overruns in any category.

g. Commitments as of date of request.

The amount to be advanced upon such a request was understood to be the amount indicated as being needed for the ensuing month, adjusted for errors, less the net unexpended balance, if any.

On May 2, 1952, the defendant, Westmoreland Manganese Corporation, requested an advance of $418,600.00 to cover payments for land purchases, and that amount was disbursed to the said defendant on May 6, 1952.

On May 22, 1952, Westmoreland Manganese Corporation requested an advance of $525,823.00 for construction and working capital. This amount was advanced on June 6, 1952.

On July 21, 1952, an advance of $702,920.00 was requested and, of this amount $687,325.00 was disbursed on August 6, 1952, and $12,627.00 of the remaining $15,595.00 was allowed and disbursed on August 20, 1952.

On August 28, 1952, an advance of $932,520.00 was requested, and this amount was disbursed on September 17, 1952.

As of September 17, 1952, a total of $2,576,895.00 had been disbursed as aforesaid.

All of the abovementioned requests showed the same estimated total cost for the project of $3,807,250.00 and conformed in detail to the original estimate, and the plaintiff, therefore, was without any indication that the project was not progressing according to the terms of the agreement between the parties.

On November 5, 1952, an advance of $364,294.00 was requested by Westmoreland Manganese Corporation. This written request indicated a cash balance of $72[illegible] and estimated expenditures in November, 1952, of $1,00[illegible] The Comptroller found that the request was worthless and did not contain the proper information nor conform to the procedure required for securing advances. The request was therefore refused. On December 4, 1952, agents of the plaintiff and defendant, Westmoreland Manganese Corporation conferred in an effort to straighten out the situation,

and the plaintiff sent detailed instructions to the defendant on how to proceed.

On January 12, 1953, an advance of $334,745.00 was requested by the defendant, Westmoreland Manganese Corporation, which request, with cash on hand, of $134,041.00 covered anticipated expenditures for January, 1953, of $478,786.00 for certain specified categories. This request also indicated a total cost for the project of $3,807,250.00 in accord with the original estimate. The requested amount was disbursed on February 11, 1953. As of that date, the total of the advances was $2,911,640.00.

On February 9, 1953, and on February 10, 1953, an inspection was made by the plaintiff of the facilities and books of the defendant, Westmoreland Manganese Corporation, which disclosed that charges to working capital had actually been expended for capital improvements, namely road construction, for which no funds had been previously authorized or requested. The use of these funds was a misapplication, constituting a breach of the agreement between the parties, and the seeking of such funds for such use on the representation that they were intended for use as working capital was also a breach of the said agreement between the parties.

The examination of the books of the Corporation also revealed to the plaintiff a probable overrun in the cost of construction and other capital acquisitions of about $468,000.00 which had never been reported by Westmoreland Manganese Corporation, and this failure to report said overrun was also a breach of the said agreement.

On February 28, 1953, a statement was submitted by Westmoreland Manganese Corporation, indicating a revised total estimated cost for the project of $4,344,850.00 —an admission by the said defendant Corporation that it was in default in its undertaking to construct the plant and facilities for a cost not to exceed $3,807,250.00.

The said original Letter Contract GS-OOP(D)-12263 provided in Paragraph 1 thereof as follows:

"You shall begin such production as soon as possible, and commencing not later than twelve (12) months from the date of your acceptance of this order. Such production shall be at an average rate of 2,000 long dry tons per month during the first four months of operation, and continue thereafter at an average rate of 47,250 long dry tons per year."

By April 2, 1953, it had been admitted by the defendant, Westmoreland Manganese Corporation, as indicated above, that it would cost over $500,000.00 more to build the plant and to acquire the other necessary capital facilities needed than it had originally determined necessary. Westmoreland Manganese Corporation was obligated under the original Letter Contract to be producing manganese at a rate of 2,000 long dry tons of ore per month by April 7, 1953, i.e. five days later. Impliedly it had undertaken to complete the plant facilities and to begin production at a much earlier date, and, in fact by December 31, 1953, as indicated on the original Flow Sheet prepared on April 11, 1952. In any event, it was impossible on April 2, 1953, for Westmoreland Manganese Corporation to finish its construction program by April 7, 1953, much less to be in production at the average daily rate indicated, and, therefore, Westmoreland Manganese Corporation was in default on April 2, 1953, under the terms of the original Letter Contract, and both the plaintiff and the defendant, Westmoreland Manganese Corporation, recognized that the said defendant was in default and that the plaintiff was contemplating the taking of action to protect its interests.

On April 2, 1953, the defendant, Westmoreland Manganese Corporation, was in default under the original Letter Contract, and further agreements made pursuant to the provisions thereof, in the following respects, among others:

a. Westmoreland Manganese Corporation had failed to complete the facilities and to commence production within the time provided in the contract.

b. The defendant, Westmoreland Manganese Corporation, failed to keep and maintain proper books and records.

c. The defendant, Westmoreland Manganese Corporation, failed to provide accurate and proper reports.

d. The defendant, Westmoreland Manganese Corporation, failed to provide satisfactory and competent management as required.

e. The defendant, Westmoreland Manganese Corporation, failed to present accurate and realistic cash requirements on monthly flow sheets.

f. The defendant, Westmoreland Manganese Corporation, expended funds and incurred obligations in an amount exceeding that contemplated under the contract and improperly classified expenditures and misapplied funds,

Throughout this period and more particularly during the period immediately prior to April 2, 1953, the defendant, Westmoreland Manganese Corporation, was represented and advised by legal counsel of its own choice. On April 1, 1953, at a meeting of the Board of Directors of Westmoreland Manganese Corporation, duly called, the following resolution was unanimously adopted:

"Resolved that E. P. Blough, Treasurer of the Westmoreland Manganese Corporation, be authorized and instructed to sign and execute, and W. H. Specht, Secretary of the Corporation, be authorized and instructed to attest on behalf of the Westmoreland Manganese Corporation, Amendment No. 1 to Letter Order No. GS-OOP(D)-12263 between the United States of America and Westmoreland Manganese Corporation."

Fully recognizing that it was in default under the original Letter Contract, and that it was useless to insist upon the sixty days notice provided for in the mortgage agreements for the reason that said defaults could not possibly be cured, and recognizing that they had already been given notice more than sixty days prior thereto, and also that it was in dire financial circumstances, and further realizing that, even if the plaintiff advanced all of the remaining

money in the original contract fund, it could not complete the plant and facilities as required by the contract and hoping to gain additional time in which to negotiate with the plaintiff or others in an effort to extricate itself from this situation, the defendant, Westmoreland Manganese Corporation, on the 2nd day of April, 1953, entered into and executed an agreement entitled "Amendment No. 1 to Letter Order No. GS-OOP(D)-12263", whereby the defendant, Westmoreland Manganese Corporation, agreed to place the facilities on a temporary standby basis and to preserve the facilities from the elements, theft, and damage, and the United States of America agreed to make further advances for this purpose. The said Amendment No. 1 also provided, among other things, that the United States of America would make further advances to enable Westmoreland Manganese Corporation to meet certain of its outstanding accrued obligations, principally those for accrued and payable wages and salaries. The introductory paragraphs of this Amendment No. 1 are as follows:

"Whereas, the parties hereto entered into Letter Agreement No. GS-OOP(D)-12263, dated April 7, 1952 (hereinafter referred to as the "Contract"), under the terms of which the Contractor covenanted to construct facilities (as defined in the aforesaid Contract), at or near Cushman, Arkansas, which would enable Contractor to produce and process manganese ore within a period of one year from the date of the Contract; and

"Whereas, the aforesaid facilities have not been completed and the production of manganese ore will not be commenced within the period provided in the Contract; and

"Whereas, the Contractor is without funds to complete the aforesaid facilities and has currently outstanding due and overdue financial obligations to employees, ex-employees, suppliers, contractors and general creditors, which obligations the Contractor is unable to meet.

"Now, therefore, in consideration of the mutual promises herein contained and other good and val-

uable consideration, the parties hereto agree as follows:"

That pursuant to the terms of said Amendment No. 1, and in reliance on the obligations therein mutually assumed, the plaintiff made the advances and otherwise performed the covenants as set out in said agreement, and, the defendant did accept the benefits of said contract and also raised and paid over the matching moneys as required by said contract for the purpose of paying past-due wages and salaries.

Said Amendment No. 1 further provides:

"3. Notwithstanding any provision in the Contract to the contrary, the Contractor hereby grants to the Government the unqualified right and privilege of terminating the Contract at any time in the future up to the commencement of production upon determination by the Government that termination of the Contract is in the best interest of the Government; the Contract shall take no legal action to prevent such termination of the Contract by the Government, and disclaims any and all recourse by reason of such termination by the Government.

"4. Under the terms of a mortgage instrument made by the Contractor to the Government on May 22, 1952, pursuant to the terms of the Contract, it is provided that the Contractor shall have sixty (60) days from notice to remedy the Contractor's failure or refusal to perform any covenant, agreement or condition in the Contract, note or mortgage as a condition precedent to foreclosure. Contractor hereby waives the sixty-day period granted by said mortgage within which to remedy the breach, and agrees that henceforth all moratorium provisions contained in said mortgage shall be without force and effect, and in the event of termination of the Contract as provided in paragraph 3 hereof, the Contractor shall, on demand of the Government, grant the Government immediate possession of the

facilities, with the right to use the facilities in place or offsite, either directly or by contract, and the Government may lease and dispose of such facilities, provided, however, that nothing herein contained shall prejudice or impair the right of the Contractor to an accounting. Contractor shall, at the request of the Government, execute, deliver and record a supplemental mortgage under the terms of which the aforesaid sixty-day moratorium provisions shall be deleted from the original recorded mortgage.

A copy of said Amendment No. 1 is hereto attached, marked Exhibit G and made a part hereof, the original being held subject to the inspection of the parties in interest and to the orders of this Court.

OSRO COBB
United States Attorney
By G. THOMAS EISELE
Assistant United States Attorney

SECOND AMENDMENT TO COMPLAINT

(Filed in U. S. District Court on October 27, 1954)

Comes the United States of America by Osro Cobb, United States Attorney for the Eastern District of Arkansas, prior to the time of the filing of an answer by the defendant, Westmoreland Manganese Corporation, but after having filed (on June 21, 1954) one amendment to its original Complaint, and now moves this Court for an order permitting it again to amend its Complaint in the following particulars:

1.

The following amendments should be made by interlineation or substitution, as follows:

(a) Page 2 of the Amendment to Complaint, heretofore filed in this action on June 21, 1954, should be stricken, and

the attached "Substituted Page 2 to First Amendment to Complaint" should be inserted in place thereof.

(b) On Page 3, the following changes by interlineation should be made:*

Line 20—"May 6, 1952" changed to "May 7, 1952";

Line 23—"June 6, 1952" changed to "June 9, 1952";

Line 24—"$702,920.00" changed to "$702,920.17";

Line 25—"$687,325.00" changed to "$687,325.57";

Line 25—"August 6" changed to "August 7";

Line 26—"$12,627.00" changed to "$12,627.20";

Line 26—"$15,595.00" changed to "$15,594.60";

Line 27—"August 20, 1952" changed to "August 22, 1952";

Line 28—"$932,520.00" changed to "$932,519.60";

Line 29—"September 17, 1952" changed to "September 19, 1952";

Line 30—"$2,576,895.00" changed to "$2,576,895.37";

(c) The paragraph beginning at the bottom of page 3 of the Amendment to Complaint heretofore filed on June 21, 1954, which starts as follows:

> "All of the above mentioned requests showed the same estimated total cost for the project ..."

should be amended to read as follows:

> "All of the above mentioned requests showed the same total amount estimated for the project ~~(including land acquisition cost, working capital~~ provision for a second slime pond, as well as the amount necessary for the acquisition and completion of the new facilities) of $3,807,250.00 and conformed in detail to the original estimate, and the plaintiff, therefore, was without any indication that

* Every typed line, or part thereof, is counted as a "line", whether single or double spaced.

the project was not progressing according to the terms of the agreement between the parties."

(d) The second full paragraph on Page 4 of the said Amendment to Complaint mentions an advance of "$334,745.00". This figure should be amended to read "$344,744.85". The second sentence of the said paragraph as found in the said Amendment to Complaint contains the words "total cost for the project". The word "cost should be stricken and the words "cash requirement" should be substituted therefor. The figure of "$2,911,640.00" found in the last sentence of said paragraph should be changed to read "$2,921,640.22".

(e) The second full paragraph on Page 5 of the Amendment to Complaint, which now begins as follows:

"On February 28, 1953 ..."

should be stricken and the following paragraph inserted in place thereof:

"On February 28, 1953, a statement was submitted by Westmoreland Manganese Corporation indicating a revised total estimated cash requirement for the project of $4,344,850."

(f) In the fourth line on page 6 of the Amendment to Complaint is found the date "December 31, 1953". This date should be "January 1, 1953".

2.

Paragraph XIII of the original Complaint should be stricken and the following paragraph XIII should be substituted therefor:

"XIII

"That pursuant to the Original Letter Contract, Amendment No. 1 thereto, and the Mortgage Note executed by the defendant, Westmoreland Manganese Corporation, the plaintiff advanced as of the date of this Complaint the principal sum of $3,000,381.03, against which sum certain credits, ag-

gregating $123,374.53, have been allowed the defendant, Westmoreland Manganese Corporation, on the dates and in the amounts as follows:

"April 13, 1953—$119,230.31 for cash withdrawal from the joint bank account of the plaintiff and defendant;

"May 19, 1953—$4,136.42 for work performed by the defendant, Westmoreland Manganese Corporation for Southwestern Engineering Company; and

"November 10, 1953—$7.80 for insurance premium adjustment;

"leaving a principal balance advanced by the plaintiff to the defendant, Westmoreland Manganese Corporation, as of the date of this Complaint, of Two Million Eight Hundred Seventy-Seven Thousand Six Dollars and Fifty Cents ($2,877,006.50) and interest has accrued thereon as of the date of this Complaint in the amount of One Hundred Fifty-Nine Thousand Six Hundred Thirty-Nine Dollars and Nineteen Cents ($159,639.19) and on which principal balance interest accumulates daily at the rate of Three Hundred Fifteen Dollars and Twenty-Eight and Eight Tenths Cents ($315.288). No payment of either said principal balance or interest on this indebtedness by the defendant, Westmoreland Manganese Corporation, has been made, and the total amount is now due and payable to the plaintiff."

3.

The prayer in the original Complaint should be amended to show the principal sum due of "$2,877,006.50" (instead of "$2,876,498.71") and interest in the sum of "$159,639.19" (instead of "$315.23").

4.

The plaintiff further desires to supplement its original Complaint by adding the following paragraphs:

"XI-A

"On or about July 21, 1954, the plaintiff, acting by and through John M. McGee, Acting Regional Director of the General Services Administration, notified the defendant, Westmoreland Manganese Corporation, of the said defendant's defaults in performance of its obligations under the Real Estate and Chattel Mortgage and Contract GS-OOP(D)-12263. This notice of default was given pursuant to the provisions concerning same found in the said Real Estate and Chattel Mortgage. In referring to the said defaults, the said notice incorporated the allegations contained in the Amendment to Complaint heretofore filed by the plaintiff in this action on June 21, 1954. The said notice letter concluded as follows:

"'On November 24, 1952, by letter to your Corporation from Mr. Johnston Russell of this Administration, you were given notice of several defaults under the contract and mortgage, and we do not hereby waive any right under that or any other notice of default heretofore given.

"'By the giving of this notice, we do not admit that such notice is necessary and we do not waive any rights which the government has or may have under Amendment No. 1 to Contract No. GS-OOP(D)-12263, executed on April 2, 1953.'

"As of the date of the filing of plaintiff's 'Second Amendment to Complaint', the default referred to in the notice letter remain and continue unremedied. Under the option contained in the Real Estate and Chattel Mortgage, plaintiff has declared and does declare the entire indebtedness due and payable. (See pages 16 and 17 of the Real Estate and Chattel Mortgage.)"

"XI-B

"Prior to the filing of the original Complaint herein on January 8, 1954, defendant failed to pay certain taxes due the United States of America as well as other taxes, and assessments, and failed to maintain insurance as required under the mortgage instruments. For such failure, 60 days notice of which is *not* required (see subparagraph e, page 16 of Real Estate and Chattel Mortgage), plaintiff mortgagor declared (pursuant to the option mentioned in the last paragraph), and does hereby declare, the entire indebtedness due and payable."

5.

The entire sentence on page 3 of the original Complaint (lines 20-26), commencing with the words:

"For the purpose of assisting Westmoreland Manganese Corporation in the installation ..."

should be stricken and the following sentence substituted therefor:

"For the purpose of assisting Westmoreland Manganese Corporation in the developing, equipping, preparation, and operation of its properties and facilities (including working capital, completion of land purchase, and the acquisition and installation of new facilities), the United States of America agreed to advance sums of money in a total amount not to exceed $3,807,250.00, said advances to bear interest at the rate of 4% per annum from the date of each advance and to be payable on or before January 1, 1960."

This motion is made for the purpose of correcting certain errors contained in previous pleadings and for the purpose of more accurately alleging the facts.

The plaintiff further moves the Court, in the event this motion is granted, to enter its order designating this motion as the "Second Amendment to Complaint".

OSRO COBB, United States Attorney
/s/ G. Thomas Eisele
By G. THOMAS EISELE
Assistant United States Attorney

SUBSTITUTED PAGE 2

original Cash Flow Sheet, showing the estimated cost of each major component of the contemplated construction work and also the amount estimated as being required for each component for each month of the anticipated construction, totaled to show the estimated cost of the acquisition and completion of the entire facilities, which should not exceed $2,788,650.00 (of which $155,000 was to be used for the construction of a second slime pond, if and when required) and showing the amount estimated as being required to pay off the balance owed on mining properties not to exceed $418,600.00 and the amount estimated for working capital requirements of the new facilities not to exceed in the aggregate $600,000.00. It was understood that this Cash Flow Sheet would conform as nearly as possible to the detailed cost estimates submitted by the defendant, Westmoreland Manganese Corporation, during negotiations prior to the execution of the original Letter Contract. The original flow sheet of estimated costs was prepared on April 11, 1952, by the defendant, Westmoreland Manganese Corporation and on its face, it indicated that the construction program would be completed by January 1, 1953, and that the operation of the washing plant should begin by that date. A countersignature system was also established, which required the Dallas, Texas, Comptroller of the General Services Administration to sign checks drawn against advances, but the sole function of the Dallas Comptroller in this respect was to assure itself that each voucher and check was legitimately charged to one of the components shown on the flow sheet and that the total of such checks against any one component did not exceed the total amount authorized and estimated therefor. It was also agreed between the parties that each request for an advance subsequent to

GOVERNMENT'S CONSOLIDATED REPLY TO CREDITOR-DEFENDANTS' ANSWERS

(Filed in U. S. District Court on January 21, 1955)

I

Reply to Answer of
Latrobe Construction Company

A.

Paragraphs 1 through 8 of the defendant Latrobe's Answer do not require a reply by the plaintiff.

B.

The plaintiff denies that the defendant Latrobe has any "miner's lien" under Sections 51-701 to 51-714 of Arkansas Statutes 1947, Annotated, as alleged in Paragraph 9 of the said defendant's Answer, which is in any way superior or prior to the lien created by the plaintiff's prior mortgage.

C.

Paragraphs 10, 11, 12, 13 and 14 inclusive of defendant Latrobe's Answer do not require a reply by the plaintiff.

D.

The plaintiff, for lack of information sufficient to form a belief, denies the allegations contained in Paragraph 15 of the defendant Latrobe's Answer, for the purpose of requiring strict proof of same.

E.

The plaintiff denies the allegations contained in Paragraph 16 of the defendant Latrobe's Answer and specifically denies that it in any way breached its contract with Westmoreland Manganese Corporation.

F.

The plaintiff denies the allegations of Paragraph 17 of Latrobe's Answer insofar as it alleges that the plaintiff

was and is engaged in a joint enterprise with the defendant Westmoreland Manganese Corporation. The plaintiff admits that it was vitally interested in the production and stockpiling of manganese when the plaintiff entered into the original letter contract dated April 7, 1952, with Westmoreland Manganese Corporation but states that its interest in the said contract was that of a prospective customer of the said defendant Westmoreland Manganese Corporation, and that the moneys were advanced by the Government to assist Westmoreland Manganese Corporation in getting into production of manganese ore. The plaintiff admits that the contract dated April 17, 1952, contains the provisions quoted in said Paragraph 17 of Latrobe's Answer. The plaintiff denies the other allegations contained in said Paragraph 17.

G.

The plaintiff denies the allegations contained im Paragraph 18 of the defendant Latrobe's Answer and particularly denies that the said defendant had any right to rely on or look to the plaintiff for the payment of any obligations incurred by the defendant Westmoreland Manganese Corporation to it. The plaintiff further asserts that the said defendant Latrobe is not entitled to the relief sought in its prayer contained in said Paragraph 18.

II

Reply to Answer of
Arkansas Foundry Company

The plaintiff incorporates the answers contained in Section I above as its reply to Paragraphs 1 through 18 of the defendant Arkansas Foundry Company's Answer.

III

Reply to Answer of Ira Sherrill

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant Ira Sherrill's Answer.

IV

Reply to Answer to Choctaw, Inc.

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant Choctaw's Answer.

V

Reply to Answer of Jeffery Lumber Company

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant Jeffery Lumber Company's Answer.

VI

Reply to Answer of Padgett Lumber Company

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant Padgett Lumber Company's Answer.

VII

Reply to Answer of
General Steel Products Company

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant General Steel Products Company's Answer.

VIII

Reply to Answer of
Mill and Mine Supply Company

The plaintiff incorporates the answers contained in Section I above as its answer to Paragraphs 1 through 18 of the defendant Mill and Mine Supply Company's Answer.

IX

Reply to Answer of Crow-Burlingame

The plaintiff incorporates the answers contained in Section I above as its answer to paragraphs 1 through 18 of the defendant Crow-Burlingame's Answer.

X

Reply to Answer of Bragg's Electric Construction Company

A.

Paragraphs 1 through 14 of the defendant Bragg's Answer do not require a reply by the plaintiff.

B.

The plaintiff denies the allegations contained in Paragraph XV of the defendant Bragg's Answer.

C.

The plaintiff denies the allegations contained in Paragraph XVI of the defendant's Answer insofar as they allege that the defendant Bragg is in any way a third party beneficiary of the contract between the United States of America and Westmoreland Manganese Corporation. For lack of information sufficient to form a belief, the plaintiff denies that a written request for an advance sufficient to pay the indebtedness owing the defendant Bragg by Westmoreland Manganese Corporation was made to the plaintiff. The plaintiff denies the remainder of Paragraph XVI of the defendant Bragg's Answer.

D.

The plaintiff denies the allegations contained in Paragraph XVII of the defendant Bragg's Answer and further denies that the said defendant is entitled to the relief prayed for in said Paragraph of its Answer.

(Following omitted parts of pleading inapplicable)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed in U. S. District Court January 27, 1954)

This cause comes on for hearing upon the plaintiff's application for the appointment of a Receiver Pendente Lite to take charge of the properties of the defendant, Westmoreland Manganese Corporation, all parties to the action as named in the original Complaint filed herein being represented personally or by counsel save and except only the State of Arkansas, which application is submitted to the Court upon affidavits and oral testimony, and the Court being well and fully advised doth make the following Findings of Fact and doth state the following Conclusions of Law, to-wit:

Findings of Fact:

1. That by two separate instruments, both dated May 22, 1952, the defendant Westmoreland Manganese Corporation mortgaged, or purported to mortgage, all of the property that it then owned, as well as all of the property that it might thereafter acquire, to the United States of America, as security for the payment of a certain promissory note dated May 22, 1952, and for the performance of a certain Letter Contract No. G OP(D)-12263 and any amendment thereto that might be entered into between the United States of America and the said defendant Corporation. Under the provisions of the above instruments, the plaintiff advanced to the defendant a principal sum in excess of $2,800,000.00.

2. That the defendant Westmoreland Manganese Corporation has suffered and permitted the following default judgments to be taken against it:

A. Judgment in favor of Koppers, Inc. in the sum of Four Hundred Thirty-Two Dollars and Twenty-Two Cents ($432.22), plus costs;

B. Judgment in favor of Continental Gin Company in the sum of Forty Thousand Seven Hundred Twenty-Seven Dollars and Seventy-Six Cents ($40,727.76), plus costs:

C. Judgment in favor of Transall, Inc. in the sum of Four Thousand Four Hundred Ninety-Nine Dollars and Six Cents ($4,499.06), plus costs;

D. Judgment in favor of Trans World Airlines, Inc. in the sum of Seven Hundred Thirty-Eight Dollars and Eighty-One Cents ($738.81), plus costs;

E. Judgment in favor of Westinghouse Supply Company in the sum of One Thousand Seven Hundred Eighty-Four Dollars and Three Cents ($1,784.03), plus costs;

F. Judgment in favor of Gardner-Denver Corporation in the sum of Four Hundred Fifty-Eight Dollars and No Cents ($458.00), plus costs; and

G. Judgment in favor of Central Scientific Company in the sum of One Hundred Seventy-Eight Dollars and Fifty-One Cents ($178.51), plus costs.

3. That the following mechanics', laborers' and or materialmen's liens have been filed, claiming certain interests in certain properties mortgaged, or purported to be mortgaged, to the United States of America:

A. Materialmen's lien in favor of Ira C. Sherrill in the sum of Three Hundred Sixty-Two Dollars and Fifty Cents ($362.50);

B. Materialmen's lien in favor of Padgett Lumber Company in the sum of Three Thousand Eight Hundred Sixty-Six Dollars and Twenty Cents ($3,866.20);

C. Materialmen's lien in favor of Mill and Mine Supply Company in the sum of Eight Thousand Three Hundred Twelve Dollars and Sixty-Nine Cents ($8,312.69);

D. Materialmen's lien in favor of Arkansas Foundry Company in the sum of Forty-Nine Thousand Two Hundred Sixty-Seven Dollars and Ninety-Six Cents ($49,267.96);

E. Materialmen's lien in favor of Jeffery Lumber Company in the sum of Two Thousand One Hundred Fifty-Seven Dollars and Fifty-Five Cents ($2,157.55);

F. Labor and materialmen's lien in favor of Latrobe Construction Company in the sum of Three Hundred Fourteen Thousand Four Hundred Seventy-One Dollars and Thirty-Three Cents ($314,471.33);

G. Materialmen's lien in favor of General Steel Products Company in the sum of Fifteen Thousand Nine Hundred Twenty-Five Dollars and Sixty-Two Cents ($15,925.62);

H. Materialmen's lien in favor of Crow-Burlingame Company in the sum of Four Thousand Three Hundred Sixty-Six Dollars and Twelve Cents ($4,366.12);

I. Labor and materialmen's lien in favor of Bragg's Electric Construction Company in the sum of Fifteen Thousand Seven Hundred Dollars and No Cents ($15,700.00);

J. Materialmen's lien in favor of Choctaw, Inc. in the sum of Three Thousand Eighty-Six Dollars and Twenty-Nine Cents ($3,086.29);

4. That a lien in favor of the United States of America (Internal Revenue) in the sum of Six Thousand Two Hundred Twenty-Eight Dollars and Forty-Two Cents ($6,228.42) has been filed in the Mechanics', Laborers' and Materialmen's Record Book B at Page W in the Circuit Clerk's office of Independence County, Arkansas.

5. That the defendant Westmoreland Manganese Corporation, by virtue of its inadequate cash and liquid assets position, cannot finance or pay for the custodial and maintenance services required for the protection and preservation of the property.

6. That the defendant Westmoreland Manganese Corporation is insolvent.

7. That much of the personal property and equipment belonging to the defendant Westmoreland Manganese Corporation, and mortgaged, or purported to be mortgaged, to the United States of America, has suffered extensive deterioration in the last few months due to the failure and inability of the said defendant Corporation to properly protect and maintain said property and equipment.

8. That the personal property and equipment of the defendant Westmoreland Manganese Corporation, as well as certain improvements and fixtures, are, in the absence of proper custodial protection, in danger of being lost, removed, and injured.

9. That the assets and properties mortgaged, or purported to be mortgaged, to the United States of America, are inadequate to discharge the debt owing, or purported to be owing, to the United States of America.

10. That the defendant Westmoreland Mangaese Corporation has allowed certain insurance policies, which are necessary for the protection of the security mortgaged, or purported to be mortgaged, to the United States, to lapse or to be cancelled by failure of the said defendant Corporation to pay the premiums due on said policies, and, further, that certain policies are about to be cancelled, as follows, to-wit:

A. Building-Builders' Risk, Fire and Extended Coverage policies in several different insurance companies in the amount of Five Hundred Thirty-Five Thousand Dollars and No Cents ($535,000.00), carried with Collins and Company, 206 Louisiana Street, Little Rock, Arkansas, have been cancelled.

B. Policy No. A 484796 in the Fireman's Fund Insurance Company in the amount of Seventy Thousand Dollars and No Cents ($70,000.00) on electrical equipment, carried with Collins and Company, 206 Louisiana Street, Little Rock, Arkansas, has been cancelled.

C. Policy No. 2654 in the Commercial Union Company in the sum of Ten Thousand Dollars and No Cents ($10,000.00) for fire and extended coverage, carried with Golden-Lindsey, Batesville, Arkansas, has been cancelled.

D. Policy No. 4D-596 with the Providence-Washington Company for fire and extended coverage in the amount of Two Hundred Eighty-Seven Thousand Two Hundred Thirty-Five Dollars and No Cents ($287,235.00), carried with Golden-Lindsey, Batesville, Arkansas, has been cancelled.

E. Policy No. 4D-594 in the Providence-Washington Company and Policy No. 2656 in the Commercial Union Company, for fire and extended coverage in the respective amounts of Twenty-Five Thousand Dollars and No Cents ($25,000.00) and Ten Thousand Dollars and No Cents ($10,000.00) have been extended under binders until the 29th day of January, 1954;

11. That the defendant Westmoreland Manganese Corporation has been at all times relevant to this action, up to and including the time of the hearing on this Motion, in possession of the properties mortgaged, or purported to be mortgaged, to the United States of America.

12. That service of process has been had upon the defendant Westmoreland Manganese Corporation, and that notice of this hearing was served upon the defendant Westmoreland Manganese Corporation on the 13th day of January, 1954, and notice of this hearing was also served upon the following named defendants, at the times indicated:

Name of Defendant	Date of Service of Notice
a. M. F. Highsmith	1-13-54
b. E. B. Blough	1-15-54
c. W. H. Specht	1-13-54
d. State of Arkansas	1-12-54
e. Transall, Inc.	1-13-54

f. Westinghouse Electric Supply Co. 1-12-54
g. Koppers Company, Inc. 1-13-54
h. Trans World Airlines, Inc. 1-13-54
i. Continental Gin Company 1-13-54
j. Gardner Denver Corporation .....
k. Ira C. Sherrill 1-14-54
l. Padgett Lumber Company 1-14-54
m. Mill and Mine Supply Company 1-12-54
n. Arkansas Foundry Company 1-12-54
o. Jeffery Lumber Company 1-14-54
p. Latrobe Construction Company 1-12-54
q. General Steel Products Company .....
r. Crow-Burlingame Company 1-12-54
s. Bragg's Electric Construction Company 1-12-54
t. Choctaw, Inc. .....
u. Carnegie Institute of Technology 1-13-54
v. Central Scientific Company 1-15-54

13. That the properties mortgaged, or purported to be mortgaged, to the United States of America are located principally in the Northern Division of the Eastern District of Arkansas.

14. The appointment of a Receiver is necessary to preserve and protect the property and preserve the status of the subject matter, pending a determination of this cause on its merits.

Conclusions of Law:

1. That this Court has jurisdiction of the plaintiff and of the defendant Westmoreland Manganese Corporation, and also of the subject matter of this action.

2. That the plaintiff, United States of America, as the mortgagee of certain or all of the properties of the defendant, Westmoreland Manganese Corporation, is a proper party to this action, and has standing to petition this Court for the appointment of a Receiver in this action.

3. That the property mortgaged, or purported to be mortgaged, to the plaintiff United States of America is in "danger of being lost, removed or materially injured"

within the meaning of that phrase as used in Sections 36-112 and 36-113 of the Arkansas Statutes of 1947, Annotated.

4. That this Court has authority under the statutes of the State of Arkansas, and independently thereof, by virtue of its inherent powers as a court of equity, to order the appointment of a Receiver in this cause, pending the determination of the issues on the merits.

5. That the plaintiff United States of America has made a *prima facie* showing that all of the assets and properties of defendant, Westmoreland Manganese Corporation, whether owned by the said defendant corporation at the time of the execution of the mortgage instruments or acquired by the said defendant corporation subsequent to the time of the execution of said mortgages, are mortgaged to the United States of America and stand as security for the payment of the note and the performance of certain contracts as alleged in the Complaint filed in this cause.

6. That the plaintiff will suffer irreparable damage if a Receiver is not appointed, and that the application of the plaintiff should be granted.

7. That plaintiff has no adequate remedy at law.

Dated this 27th day of January, 1954.

/s/ HARRY J. LEMLEY
United States District Judge

ORDER

(Filed in U. S. District Court January 27, 1954)

The Motion of the United States of America for the appointment of a Receiver Pendente Lite coming on for a hearing, all parties to the action as named in the original Complaint filed herein being represented personally or by counsel save and except only the State of Arkansas, and being presented to the Court upon the verified Complaint filed herein, the record, the affidavits of Albert H. Greene, James V. O'Dwyer, Robert J. Lippolt, R. B. Chapman, Mrs.

Prior Evans, David Saftlas, John Collins, and Peyton Golden, and upon the testimony *ore tenus* of Harry E. Meek, and upon certain documents introduced into evidence, to-wit: Letter Order No. GS-OOP(D)-12263, Amendment No. 1 to Letter Order No. GS-OOP(D)-12263, a certain "Mortgage Note", a certain "Real Estate and Chattel Mortgage", and a certain "Supplemental Mortgage"; together with other evidence, and the Court being well and sufficiently advised as to all matters of fact and law, and having filed herein its Findings of Fact and Conclusions of Law.

It is ordered, adjudged, and decreed that Honorable E. L. McHaney, Jr., Little Rock, Ark., be and he is hereby appointed Receiver Pendente Lite herein, and he is hereby directed forthwith to make the oath prescribed by law and file herein his bond in the amount of $50,000.00, conditioned as prescribed by law, which bond shall be approved by Grady Miller, Clerk of this Court.

It is further ordered, adjudged and decreed that said Receiver, after making the oath and filing his bond as hereinabove prescribed, and after the same shall have been approved as aforesaid, shall forthwith take possession of the properties, real, personal and mixed, described in the Complaint, and shall also take possession of all property, whether real, personal or mixed, including but not limited to all lands, tenements, goods, chattels, funds, assets, moneys, credits, choses in action, rights and interests of every kind, name, and nature, either in law or equity, or any part thereof, situated or located in the State of Arkansas, and acquired by the defendant Westmoreland Manganese Corporation subsequent to the execution of the Real Estate and Chattel Mortgages and Supplemental Mortgage referred to in the Complaint, and all persons or associations presently in possession of any of said properties are hereby ordered to deliver same into the hands of said Receiver.

It is further adjudged, ordered, and decreed that the Receiver shall, as soon as reasonably possible, carefully, accurately, and in detail, inventory all of said properties, indicate the status of all insurance on said properties, and

determine the custodial and maintenance requirements needed to protect and preserve the said properties of the defendant Westmoreland Manganese Corporation.

It is further ordered that the said inventory be filed with this Court and that copies thereof be made available to all of the parties to this action; that said inventory contain a full and complete description of each and every item of property, or any interest in property, belonging to the said defendant Westmoreland Manganese Corporation, indicating the date and terms of its purchase or acquisition and the name of the vendor or transferor thereof, and how much has been paid thereon, if any, and the balance owed thereon, if any, and whether or not suit has been brought for such balance as may be owed, and whether Judgment has been rendered therefor (together with the name of the Court and the date of the Judgment), and whether or not any mechanics' and or materialmen's liens have been filed therefor (together with the date of filing and the place of filing), and all other information which the said Receiver in his judgment believes will be pertinent to the issues in this action or of aid to this Court, or the parties hereto.

It is further ordered that the said Receiver prepare and file in this court, as soon as reasonably possible, a detailed list of all insurance now carried upon the properties of the defendant Westmoreland Manganese Corporation, or on any of the said properties, and, particularly, indicate all fire and extended coverage insurance which presently exists on the said properties; further, the said Receiver is directed, if he finds that the procurement of other or additional insurance is necessary for the proper protection of the said properties, or any part thereof, to procure same and report his actions to this Court.

It is further ordered that the said Receiver determine as soon as reasonably possible the maintenance and custodial requirements which may be needed to protect, preserve, and or maintain the properties in his possession and that the said Receiver report his conclusions in this regard to this Court.

It is further ordered that the said Receiver report any conditions or circumstances which he may discover which might adversely affect the assets and properties of the said Westmoreland Manganese Corporation to the detriment of any mortgage or lienholder who might possibly have an interest in said properties, or to the detriment of any other creditors of the said defendant Westmoreland Manganese Corporation.

It is further ordered that the Receiver ascertain if the possession of any property, acquired by the defendant Westmoreland Manganese Corporation subsequent to the execution of the Real Estate and Chattel Mortgage and the Supplemental Mortgage referred to in the Complaint, has been withheld from said defendant, or if delivery of any of said properties to said defendant has not been accomplished, or if any of said properties have been removed from the State of Arkansas, and if it is so found, the Receiver shall make a report thereof to this Court.

It is further ordered that the said Receiver file with this Court, within a reasonable time, a detailed estimate of the ordinary costs and expenses of the Receivership and also an itemized list of any extraordinary or non-recurring expenses which the said Receiver deems necessary to protect or preserve the property entrusted to him.

Said defendant Westmoreland Manganese Corporation is hereby ordered and directed to make available to said Receiver such of its books and records as said Receiver, in his judgment, shall deem necessary or desirable in the carrying out of the orders and instructions herein given to him.

It is further ordered that the Receiver be, and he is hereby, authorized and instructed to employ such persons and to obtain such materials and supplies as may be necessary to the proper fulfillment of his duties herein and that said Receiver make such reports to this Court as the said Court may from time to time direct.

This the 27th day of January, 1954.

/s/ HARRY J. LEMLEY
United States District Judge

Memorandum Opinion Relative to Priority of Creditor's Claims

(Filed in U. S. District Court on September, 1955)

This cause is now before the Court for a determination of the relative priorities of the claim of the Government and those of the other creditors of Westmoreland Manganese Corporation, principal defendant herein, to the property of said defendant. The controversy between the Government and the other creditors of Westmoreland (hereinafter at times referred to simply as "the creditors") relative to priority has been submitted upon the pleadings and exhibits thereto, certain stipulations of counsel, oral testimony, documentary evidence and written briefs. This memorandum, which deals with said controversy, contains our ultimate findings of fact and conclusions of law with respect thereto; and all requests for findings of fact and conclusions of law are denied, except to the extent that they may be incorporated herein.* The Government contends that the liens of its real estate and chattel mortgage and the supplement thereto, both executed on May 22, 1952, are superior to the claims of other creditors; the latter take the position that for various reasons, presently to be stated, their claims are superior to that of the Government.

The creditors, other than the Government, holding claims of over Three Hundred Seventy Thousand Dollars ($370,000), consist of suppliers of services and materials to Westmoreland in connection with the construction of the washing and concentrating plant and related improvements contemplated by the original contract between Westmoreland and the Government, dated April 7, 1952; there is no dispute as to the correctness of any of the claims, and the amounts thereof are set forth in the several stipulations

* In a memorandum filed on July 31, 1955, we held that the Government was entitled to judgment against Westmoreland for its principal claim and to foreclosure of its real estate and chattel mortgage and supplement thereto. At that time we did not undertake to pass upon the controversy between the Government and the other creditors, and stated in said memorandum that if it should become necessary to pass upon the issues involved in that controversy, they would be made the subject of a separate memorandum.

that have been filed herein. As far as the nature of their claims is concerned, the creditors fall into three groups, namely: those who claim liens under the Arkansas statutes creating "mechanics' and materialmen's liens" and "miners' liens";* those who do not claim the benefits of the statutes just mentioned, but who hold judgments for various amounts against Westmoreland;** and, finally, those who neither claim liens nor have judgments, and who are simply unsecured creditors. Since neither the Government nor Westmoreland disputes the validity or amounts of the claims in question, it goes without saying that both the lien claimants and the unsecured creditors are entitled in this proceeding to judgment against Westmoreland for their respective claims.

In support of their position that the claims of the Government are inferior to their own, all of the creditors contend that the Government's mortgage and the supplement thereto are invalid as to them, except with respect to the land purchased by Westmoreland and the improvements existing thereon at the time of the execution of said mortgages; that the relationship between Westmoreland and the Government was not the conventional mortgagor-mortgagee relationship, and that actually Westmoreland and the Government were joint venturers; that they were "third-party beneficiaries" under the contract

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* The "Mechanics' and Materialmen's Lien Statute" is Act 146 of 1895, as amended, now codified as Ark. Stats., Sections 51-601 et seq. The "Miners' Lien Statute" is Act 615 of 1923, now codified as Ark. Stats., Sections 51-701 et seq.

** All of the judgments, except one, were rendered by the Circuit Court of Independence County, Arkansas; the exception is a small judgment rendered by the Municipal Court of the City of Batesville, Arkansas, which has been docketed, as prescribed by law, with the Circuit Clerk of Independence County.

between the Government and Westmoreland;* and, further, that by reason of certain alleged equitable considerations the Government's claim to priority should be denied.

In addition to the foregoing contentions, which are common to all of the creditors, the lien claimants assert priority under the Arkansas statutes that have been mentioned. The judgment creditors do not claim to have any liens on the lands of Westmoreland or on the improvements thereon which are superior to those of the Government or of the lien claimants; nor do they assert any claim to priority with respect to personal property of Westmoreland which is covered, or alleged to be covered, by mechanics', materialmen's or miners' liens. They do contend, however, with respect to certain automotive equipment purchased by Westmoreland that there was no compliance with Section 60 of Act 142 of 1949, (Ark. Stats., Section 75-160), hereinafter discussed, and that for that reason the Government's mortgages, even if otherwise valid, are invalid as to such equipment as far as creditors acquiring a lien by levy of execution are concerned, and that the Court should, in the exercise of its discretion, now permit them to have execution issued out of the State Court and levied upon such equipment, notwithstanding the existing receivership, so as to give them the benefit of the statute last mentioned.

The Government, for its part, denies the validity of all of the contentions of the creditors above outlined, and, as indicated, takes the position that its mortgage liens entitle it to priority as against all of the other creditors.

Taking up first the question of the validity of the Government's mortgages it is not contended that said mortgages were not properly executed, acknowledged and recorded, and apparently the creditors do not contend that

* We do not understand that the creditors carry their joint venture and third party beneficiary arguments so far as to claim that the Government is directly liable to them for materials and services furnished to Westmoreland; but they do contend that by reason of the alleged relationship between the parties the Government's claim should not be accorded priority over theirs.

said mortgages are invalid as to them as far as the land itself and the improvements existing thereon at the time the instruments were executed are concerned. They do contend, however, with respect to the improvements subsequently placed upon the land, and with respect to the personal property subsequently acquired by Westmoreland, that the descriptions in said mortgages are, as to third persons, void for indefiniteness, and, further, that said descriptions are "ambulatory". We do not agree.

It is a well settled principle of Arkansas law that a mortgage will not be held void for uncertainty even as to third persons, where by any reasonable construction it can be sustained; and where the description used furnishes a key whereby a person, aided by extrinsic evidence, can ascertain what property is covered, such description is sufficient. *Johnson* v. *Grissard*, 51 Ark. 410; *Snyder* v. *Bridewell*, 167 Ark. 8; and *American Investment Co.* v. *Gleason*, 181 Ark. 739. Furthermore, a description in a chattel mortgage is sufficient if a disinterested person, aided by inquiry suggested by the instrument, can identify the property intended to be covered. *Gurley* v. *Davis*, 39 Ark. 394; *Beckler* v. *Snerly*, 169 Ark. 317; *Blankenship* v. *Modglin*, 177 Ark. 388; *Neece* v. *Guerin*, 210 Ark. 954.

In *Johnson* v. *Grissard*, *supra*, a mortgage was upheld as against a third person where the only description of the property was "all my crops of corn, cotton or other produce that I may raise, or in which I may have in any manner an interest for the year 1884, in Faulkner County, Arkansas". The Court said that the description was not so indefinite and uncertain that it could not be made certain by extrinsic evidence; that the record of the mortgage was constructive notice, and that all persons buying any cotton from the mortgagor in Faulkner County were bound to inquire whether it was covered by the mortgage to Grissard. In *Snyder* v. *Bridewell*, *supra*, a mortgage was held good as to third parties where the description was simply "all property owned by the Nashville Lumber Co., or afterwards owned by the Nashville Lumber Co., or afterwards acquired by it in Howard ... (county, Arkansas)". The Court stated that the deed furnished a key

whereby the land might be identified and was sufficient. In *American Investment Co.* v. *Gleason, supra*, the Court stated that "... it is settled in this State that a deed or mortgage cannot be declared void for uncertainty if it is possible, by any reasonable rule of construction, to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. In short, the office of the description in a deed or mortgage is not to identify the land, but to furnish the means of identification" (181 Ark. at 743).

In *Blankenship* v. *Modglin, supra*, the chattel mortgage in question described the mortgaged property as being, "All corn and cotton to be grown by (mortgagor) on the farm belonging to Earl Keich". That description was held sufficient against third parties although it appeared that Keich owned several farms; the Court pointed out that any disinterested person by reading over the mortgage and by making inquiry could have discovered that the mortgagor lived on one of Keich's farms and was making a crop of cotton and corn on it; it was said: "This court has laid down the rule that a mortgage of personal property is sufficient as to description if it be such that a disinterested person, aided only by such inquiry as the instrument itself suggests, is able to identify the property" (177 Ark. at 390). In *Neece* v. *Guerin, supra*, the Court cited with approval the decision of the Supreme Court of Oklahoma in *Hillery, et al* v. *Waurika Nat. Bank*, 100 Okla. 34, 226 Pac. 1051, wherein it was said, among other things, "...'As against third persons the description in the mortgage must point out its subject-matter so that such persons may identify the chattels covered, but it is not essential that the description be so specific that the property may be identified by it alone, if such description suggest inquiries or means of identification which, if pursued, will disclose the property conveyed'.... 11 C. J. 457" (210 Ark. at 958).

The description of property in the original mortgage before us consists of six sections, alphabetically designated A-F, both inclusive; in sections A through D the land and mineral rights here involved are definitely and specifically

described; Section E consists of two numbered paragraphs, the first of which specifically describes certain personal property owned at the time by Westmoreland, and the second of which covers, "Furniture, fixtures, machinery and equipment and all other personal property hereafter acquired by Mortgagor, together with all and singular the parts of and accessories to all said property whether now belonging thereto or hereafter added thereto by way of renewal, replacement or otherwise." Section F covers, "Any and all property, real, personal or mixed or rights to property hereafter acquired by Mortgagor, including the special bank account or accounts established by Mortgagor pursuant to the agreement of April 7, 1952, between Mortgagee and Mortgagor and any amendment thereto."

The supplemental mortgage recites that it was executed as a supplement to the original mortgage and that no rights under the original mortgage were waived by the mortgagee; Section I of said supplemental mortgage consists of a preamble and several paragraphs, alphabetically designated A-G, both inclusive. In the preamble it is recited that for the purpose of making more explicit the description of certain properties encumbered by the original mortgage the mortgagor acknowledged that said original mortgage was intended to and did cover, and that the supplemental mortgage also covered the property referred to in the succeeding paragraphs of the Section. Paragraph A specifically refers to the washing and concentrating plant then in existence and owned by Westmoreland, located about seven miles from the town of Cushman in Independence County, Arkansas, and Paragraph B specifically refers to the new washing and concentrating plant proposed to be built by Westmoreland at or near the site of the original plant; said paragraphs not only refer to the plants but also to "all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, sidings, switch tracks and all other machinery equipment and personal property (including office equipment and automotive equipment) now or at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect".

Paragraph C purports to cover, "All other machinery, equipment and personal property (whether similar or dissimilar to any of the foregoing), wherever located, now owned by Mortgagor or at any time hereafter acquired by it."

As indicated, the original mortgage specifically described the lands owned by Westmoreland on May 22, 1952;* and we are satisfied that Paragraphs A and B of Section I of the supplemental mortgage, when read in the light of the principles laid down in the cases heretofore cited, are sufficiently definite in their descriptions of the existing plant and the new plant, and of the "buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, slime pond facilities, sidings, switch tracks and all other machinery, equipment and personal property" owned or to be acquired for use in connection therewith, to be binding upon third parties such as the creditors here. The creditors were on notice as to the existence of both the original and the supplemental mortgage, and a reading of those instruments by any disinterested person would have revealed that the Government was taking a mortgage on all land that Westmoreland owned in Independence and Izard Counties, Arkansas, on the plant that was then in existence, and on the one that was to be built, including all of the items of property that Westmoreland then owned or might thereafter acquire for use in connection with said plants and in connection with its contemplated mining operations. With this knowledge any reasonable inquiry would have revealed what property of Westmoreland was covered by the mortgages at any particular time; naturally, it was impossible for the parties at the time to describe in detail all of the particular items of property which might be acquired in the future. It should be kept in mind that we are not here concerned with any property of Westmoreland located anywhere except Independence and Izard Counties, Arkansas, nor are we concerned with any property acquired by Westmoreland

* There is no evidence that Westmoreland has ever acquired any lands other than those described in the original mortgage, so we are not here concerned with any after acquired lands.

for uses other than the construction of the plant and the mining and treating of manganese ore.

Counsel for the creditors have not cited us to any case which would indicate that the descriptions contained in Paragraphs A and B of Section I of the supplemental mortgage are void as to third parties for indefiniteness. If the Government were required to rely solely upon Section F of the original mortgage and upon Paragraph C of Section I of the supplemental mortgage in order to bind the new improvements and the personal property subsequently acquired, it might be arguable that the descriptions contained in those paragraphs are too vague and indefinite to be valid as against third parties; see *Turrentine* v. *Thompson*, 193 Ark. 253. But, as has been pointed out, such is not the case.

In support of their contention that the mortgages have "ambulatory" descriptions and are void as to them, the creditors cite Hughes, "Arkansas Mortgages", section 64, wherein it is said: "... A description is ambulatory if it fits one article at one time and another article at another time. Thus a mortgage by the owner of an operating mill of 50,000 feet of lumber 'of the last sawing', meaning that the mortgage should always cover the last 50,000 feet sawed is ambulatory and void." In support of that statement the author cites *Smith* v. *McCoy-Kessinger Lumber Co.*, 108 Ark. 162; and that case so holds. But we do not have here the situation presented in the Smith case. It is obvious that under a mortgage such as was involved in that case the property covered by the mortgage would vary from day to day in that a lot of lumber that was "of the last sawing" on one day would not be "of the last sawing" on the following day; in the instant case, however, we are not concerned with a mortgage under the terms of which property acquired by Westmoreland would be covered only temporarily; under the provisions of the mortgages here involved all property acquired by Westmoreland would be covered by such mortgages and would remain covered until the mortgages were satisfied. Of course, since the mortgages were construction mortgages, and since Westmoreland was to acquire properties with money to be ad-

vanced by the Government, the amount and value of the latter's security would increase as the project progressed, but that would not affect the validity of the mortgages. Any argument to the contrary would simply amount to a contention that after acquired property clauses in mortgages are void, which is not the law.

It is further argued by the creditors on this phase of the case that Section II of the supplemental mortgage* constitutes an admission that the descriptions of future acquisitions contained in the original mortgage and in the supplemental mortgage are void for indefiniteness. But the idea of such an admission is expressly negatived by the language of Section II which has been quoted. All that Section II accomplished was to give the Government the right to demand from time to time that new mortgages be given it specifically describing the items of property that had been acquired by Westmoreland at the times that such demands might be made; that the Government, out of an abundance of caution, desired that right does not imply that the existing descriptions were insufficient, and we have held that they were sufficient.

As to the joint venture theory advanced by the creditors, the contract between the Government and Westmoreland required the latter to produce and sell to the Government over a period of years 264,000 long, dry tons

* That section reads as follows: "While it is agreed that all future acquisitions by Mortgagor of real property, mineral interests and personal property shall, by virtue of the 'after acquired property' provisions of said Real Estate and Chattel Mortgage, and of this Supplemental Mortgage, be subject to the lien of each of said two instruments, nevertheless, to the end that such future acquisitions may be encumbered under instruments more specifically describing the same, Mortgagor agrees that it will, from time to time upon request of Mortgagee, execute, acknowledge and deliver to Mortgagee, and cause to be established of record, such additional instruments, on forms approved by Mortgagee, as may be necessary to encumber all such after acquired property items under a more specific description. The failure or refusal in any instance to execute such additional instruments and establish the same of record shall constitute a ground for the acceleration (at Mortgagee's option) of the maturity of the secured indebtedness additional to the events of acceleration recited in said Real Estate and Chattel Mortgage."

of manganese ore to be paid for at stated prices; in order to enable Westmoreland to acquire mineral lands, to build its plant, and to get into production the Government agreed to advance to Westmoreland not more than $3,807,250, including $155,000 which was to be advanced if, and only if, it should be determined that a "second slime pond" should be constructed. Of this sum of $3,807,250, $418,600 was to be used for land acquisition, $2,788,650 was to be used for the acquisition and completion of the new facilities, and $600,000 was to be used for working capital; all advances were to bear interest at the rate of 4% per annum. It was agreed that so long as any part of the moneys advanced by the Government should remain unpaid, the ownership and management of the corporation should be subject to governmental approval, and it was agreed that no substantial change in ownership or management would be made without the prior approval of the Government. It was agreed that Westmoreland might at any time repay its debt to the Government, either in whole or in part, and that upon expiration of the term of the contract, or upon prior termination thereof, any advances made by the Government that had not been repaid should be immediately due and payable. The contract further provided that Westmoreland might withdraw from net profits after taxes not more than $75,000 in any calendar year. It was further agreed that Westmoreland would make its facilities available for the processing at fair and reasonable charges to be fixed by the Government "any and all quantities of native run ore of types and kinds similar to those which are the subject matter of this agreement which are furnished by the Government from ores purchased by the Government from other producers in your area throughout the term of this contract", but not more than 10% of the ore to be processed by Westmoreland to be sold to the Government under the contract. Paragraph 7 of the contract provided that it should terminate upon the production of 264,000 long dry tons of ore from the facilities to be constructed, or upon the expiration of six years after commencement of production, or upon the repayment to the Government of all advances plus interest. Westmoreland was required to maintain proper books and records, and adequate insurance, and to submit certain periodic reports;

and the Government was given the right to maintain one or more representatives at the site of the work "to have access to the books and records of the corporation at all reasonable times, to audit such books and records and to observe all operations of the corporation." The final paragraph of the contract recites that it was entered into pursuant to the Defense Production Act of 1950, as amended (Public Law 774, 81st Congress, and Public Laws 69 and 96, 82d Congress).

In the preceding paragraph we have endeavored to abstract those provisions of the contract upon which the creditors' claim of joint venture is based, and although the creditors urge that said contract constituted a joint venture between the Government and Westmoreland, we do not believe that any such relationship was created thereby or by the performance of the parties under it. In order to constitute a joint venture it is essential that there be a joint proprietary interest in the subject matter of the venture, a right of mutual control with respect thereto, and an agreement, express or implied, for the sharing of profits. 30 Am. Jur. "Joint Adventures", Sections 11 and 12. In *State ex rel. Attorney General* v. *Gus Blass Company*, 193 Ark. 1159, the Supreme Court of Arkansas held that there was no joint venture between the Gus Blass Company and one Gainsburg, who was operating an optical department in the former's store under a contract of lease, notwithstanding the fact that rent was paid out of net sales, that salaries of employees were advanced by the Company and charged to the lessee, and that the Company had a right to exercise control over who should be employed by the lessee. The Court, speaking of what was necessary to constitute a joint venture, said:

> "To constitute a joint adventure, there must be the elements of a partnership. As between the parties themselves there must have been an intention to form a partnership as expressed in the contract or gathered from acts of the parties and circumstances which may interpret such agreement. As between themselves or third parties, 'there are certain requisites necessary before the law will in any event regard the relationship as that of partners

> The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services and having a community of interests in the profits.' *Meehan* v. *Valentine*, 145 U. S. 611, ... The doctrine announced in this case was quoted with approval in *Cully* v. *Edwards*, 44 Ark. 423, 51 Am. Rep. 614. That case was followed in *Roach* v. *Rector*, 93 Ark. 521, ..., in which it was stated in effect that the parties to the contract must be co-principals in the business, and if it is owned by one, and the other receives the profits or a portion thereof, for services or otherwise, the relationship of partners does not exist. Quoting further from that case, it is said: 'As between the parties themselves, before it has been said that the relationship of partners has been created, it is essential that the parties themselves intended by the effect of their contract to form such a partnership business, and that they should have a common ownership and community of interest in the properties of the business, and they should share in some fixed proportion in the profits thereof only as profits of the business.'
>
> "These rules apply not only to a general partnership, but to a limited one, a joint adventure. The facts . . in the instant case . . . show that the parties did not intend to form a partnership, that they did not have a common ownership and community of interest in the property of the business, nor did they share in the profits in some fixed ratio. This being true, it follows that the contract was one of lease, ..." (193 Ark. at 1176-1177).

It is clear that under the contract involved here the Government had no proprietary interest in the Westmoreland properties whatever, other than the security interest created by the mortgages, and it is equally clear that in no event was the Government to share in any profits earned by Westmoreland. It is, of course, true that the Government was interested, in the discharge of its duty as a sov-

creign to provide for the national defense, in procuring manganese for stockpile purposes, and in that sense it would have benefited from Westmoreland's contemplated performance; but the receipt or expectation of benefits is common to almost all contracts; and it certainly cannot be said that because a contracting party benefits from the performance of the contract by the other they are joint ventures, or that the former is sharing in the profits earned by the latter as a result of his performance. Here, both parties were interested in the performance of the contract, but their interests were entirely different qualitatively; the Government was interested in the production of manganese for defense purposes, whereas Westmoreland was interested in financial profits.

The creditors lay stress upon the fact that the Government advanced, or agreed to advance the moneys that would be required by Westmoreland in order to perform the contract, and that the Government was not motivated in so doing by a desire to earn interest on the funds to be so advanced; but we deem that to be immaterial. It is not at all unusual for a party to advance money to another to enable the latter to produce or process articles for the purpose of thereafter selling them to the former; in such cases provisions for interest on the advances are ordinarily merely incidental to the main object of the parties. But such an arrangement does not constitute them joint ventures; in this connection in 30 Am. Jur. "Joint Adventures", Section 23, page 688, it is said: "Although one party's contribution to a joint adventure may be to provide the funds necessary to finance it, the mere fact that one loans or advances money to finance the scheme of another does not make him a joint adventurer with such other in carrying out the scheme. Nor, in general, does such a lender become a joint adventurer by reason of the borrower's agreement to pay him as compensation for advancing the money a share of the profits received; where the lender has no control over or interest in the scheme itself beyond such right to a share of the profits, and does not share in the losses." It is true that in the instant case the Government had a right to exercise, at least in a negative sense, certain control over Westmoreland in its operations; but that right

of control was reserved solely for the purpose of protecting its security interests and seeing that the money advanced by it was not used for unauthorized purposes; and it must be remembered that under the express terms of the contract Westmoreland at any time could have freed itself from governmental control simply by repaying the Government the moneys advanced, plus interest.

Counsel for the creditors insist on referring to the Westmoreland project as a "Government project". It was not a "Government project", but was Westmoreland's project financed by the Government to the extent agreed upon, and as authorized by the Acts of Congress referred to in the contract. Had Westmoreland completed the contract, then upon the expiration thereof, it would have owned the remaining ore body and the residual value of the plant, equipment and facilities, the Government having no interest therein.

In support of their claim of joint venture the creditors cite *Laser* v. *State, ex rel. McKinley, Commissioner*, 198 Ark. 945; *Fourth National Bank* v. *Portsmouth Cotton Refining Oil Co.*, 5 Cir. 284 F. 718; and *Dexter & Carpenter, Inc.* v. *Houston, et al*, 4 Cir., 20 F2d 647. None of those cases appears to be in point. In the Laser case no question of joint venture was raised; the Court simply held that under the facts in that case the lease arrangement there involved was "just a method of operating the coal mine by appellant (lessor) himself" for his own financial benefit; in the instant case Westmoreland was in no sense an agent of the Government; it was building a plant for its own use and benefit and was intending to mine and treat manganese ore to be sold to the Government, the profits to inure to the benefit of itself; furthermore, the control which the Government had over the operation was essentially negative, and, as stated, Westmoreland could free itself from that control at any time by discharging its debt. As to *Fourth National Bank* v. *Portsmouth Cotton Oil Refining Co., supra*, a reading of the opinion of the District Court *Portsmouth Cotton Oil Refining Co.* v. *Fourth National Bank*, DC, Ala., 289 F. 879) reveals that there the Court was concerned with a corporation that was, in effect, a

subsidiary of the Bank, and that the latter completely controlled and dominated all of its activities, and that it owned no property that had not been conveyed to it by the Bank. Here, Westmoreland was not a subsidiary of the Government; it had its own corporate existence and some assets before the Government ever came into the picture, and it was pursuing its own ends. True, the Government agreed to finance its operations, but as we have seen, that is not sufficient to create the relationship of joint venturers. *Dexter & Carpenter, Inc. v. Houston, et al, supra*, is not at all applicable here; there, two wholesalers agreed between themselves to lend money to third persons to purchase and operate a coal mine; as consideration for the loan the two companies were to be given the exclusive agency to sell the output of the mine for a period of years; it was held that in making this loan the two *wholesalers* were as between themselves, joint venturers, but it was not even suggested that either of them was engaged in a joint venture with the persons who were to buy and operate the mine.

Before leaving the question of joint venture it should be pointed out that we recognize that in certain circumstances there may be a joint venture by estoppel as to third parties, regardless of the relationship of the parties as between themselves. Here, however, there is no evidence that any authorized officials of the Government ever represented to anyone that the Westmoreland project was a joint venture between the Government and Westmoreland or ever took any action that would indicate that such was the case. Hence, there is nothing here upon which a finding of joint venture by estoppel can be predicated.

The creditors, in support of their claim that they were "third party beneficiaries" under the contract between the Government and Westmoreland, point to those provisions of the contract which required Westmoreland to construct its plant and produce manganese, and to make necessary commitments for supplies and services to enable it to do so, to those which obligated it to establish a separate bank account or separate bank accounts, to refrain from comingling funds advanced by the Government with its own funds, and to establish a counter-signature

system for the disbursement of funds advanced by the Government; and they lay particular emphasis upon Paragraph 5(c) of the contract which required Westmoreland to furnish the Government with "unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you, which will be fully paid for through the advance of funds by the Government as prescribed herein". It is argued that those provisions were inserted for the protection of creditors, and that they were entitled to rely thereon. We reject that argument.

The requirement that Westmoreland should build the plant and should proceed to make necessary commitments for materials and services was, in our estimation, nothing more than expression of Westmoreland's primary obligation under the contract; of course, the Government desired for the plant to be constructed and operations commenced as soon as possible, and it desired to avoid unnecessary delays on the part of Westmoreland in making commitments for needed labor and materials. The requirements for separate bank accounts and for a countersignature system were, it seems obvious, inserted not for the benefit of creditors but for the protection of the Government's financial interests, and to insure that there was no dissipation or misappropriation of funds. The phrase in the contract that has been quoted did not amount, in our opinion, to an undertaking by the Government to see to it that everyone who supplied materials or services to Westmoreland would be paid out of the funds advanced by the Government; rather, it seems nothing more than a recognition that Westmoreland was to pay for such materials and services, and that it was to use the money advanced by the Government for that purpose. There is no undertaking that the funds to be advanced by the Government would be sufficient to pay all of Westmoreland's bills; in this connection it should be noted that the Government had no control over the commitments that Westmoreland might make, or with respect to the ultimate cost of the facilities; the Government did limit itself to an overall advance of $3,807,250, broken down into at least the three major categories of land acquisition, acquisition and construction of new facilities, and working capital; and it did have control

over the *disbursement* of funds advanced. Had the Government undertaken to protect the creditors or to underwrite all of Westmoreland's obligations, it is inconceivable to us that it would not have reserved some control over the liabilities that Westmoreland might incur, or have inserted some provision in the contract which would have protected it from uncontrolled expenditures by the contractor; but such was not done. To our mind, the third party beneficiary argument overlooks, as to some of the other arguments, that this was Westmoreland's project, and that it was the duty of the latter, rather than of the Government, to build the plant and pay for it; the only duties of the Government were to make advances under the terms of the contract, and to purchase manganese from Westmoreland and to pay the stipulated prices therefor.

Nor do we agree with the creditors that there are equities here that should move the Court to deny to the Government any priority to which it is otherwise entitled. The position of the creditors in this connection seems to be that they relied upon the Government to protect their interests and to see that they were paid; that the Government by reason of its control over the disbursement of funds could have protected them and that it failed to do so; that the Government did not advance to Westmoreland all of the money that it was supposed to advance, and for that reason should be denied priority; and that the Government, after the execution of Amendment No. 1 to the original contract, withdrew the balance in Westmoreland's special bank account amounting to $119,230.31, and that it should, in equity, be required, in any event, to make that sum available to be applied on the claims of the creditors.

The fallacy of those contentions lies in the fact that the Government contracted with Westmoreland and not with the creditors; there was no privity between the latter and the Government, the Government owed them no duty to protect their interests, and there is no evidence here that any Government official ever took any action that would have entitled any of the creditors to rely upon the Government for the satisfaction of its claim.

Apart from Crow-Burlingame Company and Bragg's Electric Construction Company, there is no evidence that any of the creditors in fact relied upon the Government in extending credit to Westmoreland; but assuming for purposes of argument that in extending such credit they did rely generally upon the Government, in the sense that they thought that the latter would see to it that they were paid, they had no right under the contract so to do. If they are to prevail under the theory now under discussion, they must show that some responsible official of the Government took some action calculated to lead them to believe that the Government would protect their interests, and that they relied upon such action when they extended credit to Westmoreland. This, they have failed to do.

There is no evidence here that any authorized agent of the Government ever at any time made any statements or took any action that would indicate to the creditors that the Government was underwriting Westmoreland's obligations, or that in controlling Westmoreland's disbursements, or otherwise, it was purporting to protect the interests of the creditors, or doing anything except protecting its own interests. As we have said, the Government had no control over Westmoreland's commitments or over the ultimate cost of the project; and, furthermore, it had nothing to do with initiating payments to any creditor. That initiative lay entirely with Westmoreland; when its officials would submit an invoice and check to the Dallas Office of the General Services Administration, Mr. R. B. Chapman, who was the Regional Disbursing Officer at that office, would check to see whether or not there were funds available to pay such invoice, and if there were, and if the invoice and check were in proper order, he would countersign the check and mail it to the payee thereof; otherwise, it would be returned to Westmoreland. We do not think that the mere fact that from time to time the creditors received checks which had been countersigned by Mr. Chapman, gave them any right to assume that the Government was guaranteeing the payment of their accounts, or that the counter-signature system had been devised for their benefit or protection.

Moreover, aside from what the creditors may have thought about the matter, the fact remains that Mr. Chapman was not a contracting officer and had no authority to bind the Government to pay any claim, or to guarantee the payment of any claim. He was simply a disbursing officer whose functions were essentially ministerial. It is a well settled principle of law that all agents of the Government are special agents with limited authority; and all parties dealing with them are charged with notice of that fact and of the limitations upon the authority of the agents with whom they deal.* As pointed out in our first memorandum, the responsible Government officials who were charged with the administration of this contract were Mr. John G. Ford, Director of the Contracts Negotiation Division of the Defense Materials Procurement Administration, and his deputy, Mr. Arthur L. Sherman, and that fact could have been easily ascertained by inquiry on the part of any of the creditors. There is no evidence that any of the creditors ever inquired of either Mr. Ford or Mr. Sherman, or of any of their superiors in the D.M.P.A., whether or not the Government was standing behind Westmoreland's obligations; such inquiry could have readily been made, and had it been made, the inquiring creditors, we are satisfied, would have been promptly informed that the Government was not guaranteeing the payment of any claims.

Now, the evidence does show that certain conversations were had on different occasions between Mr. Chapman and representatives of Crow-Burlingame and Bragg's Electric Construction Company, respectively; we have carefully considered the testimony bearing upon those conversations, and we do not think that it can be fairly said that in the course thereof Mr. Chapman undertook on behalf of the Government to guarantee the payment of the respective claims of the two creditors just mentioned, or to assure their representatives that their claims would be paid in any

* Without intimating that the distinction is of importance here, we point out in passing that we are satisfied that in its dealings with Westmoreland the Government was acting in its sovereign or governmental capacity, rather than in a "proprietary" capacity. In acquiring manganese for stockpiling purposes the Government was acting entirely in the interest of national defense.

event out of Government funds; nor do we feel that the representatives of those two creditors could have reasonably so understood. But even were the case otherwise, the fact remains that Mr. Chapman was simply a disbursing officer, and all parties dealing with him were charged with notice of the limitations on his authority.

With particular reference to the second conversation between Mr. Chapman and the representatives of Bragg's, it appears that Mr. Chapman said, in effect, that if approved invoices for the balance of Bragg's contract should be presented, checks in payment therefor would be countersigned; and had those invoices been in fact presented, payment might well have been made. As stated, however, Mr. Chapman could not initiate any payments to Bragg's or to any other creditor, and it does not appear that Westmoreland ever presented for counter-signature any check or checks in payment of the balance due Bragg's.

As to the action of the Government in declining to advance moneys to the full extent of its orignial contractual obligations, it should be repeated that the Government's obligations ran exclusively to Westmoreland and not to the creditors. Therefore, even if the Government failed to advance all of the moneys that it should have advanced, the creditors would be in no position to complain thereof. It should be said, however, that the creditors' assertion that the Government did not advance all of the moneys that it was required to advance is not strictly accurate from a factual standpoint. Under the contract advances were to be made to Westmoreland only upon the latter's request, and there is no question that the Government advanced to Westmoreland all of the moneys which the latter requested to be advanced under that contract, the last request being made about January 12 and being honored by a deposit to Westmoreland's credit in Special Account No. 1 around February 14; and the evidence further shows that even after the Government took the position that it was not required to countersign checks drawn on flow sheet categories that were overrun, it continued, up until the execution of Amendment No. 1, to honor checks drawn on categories that were not overrun. It should be re-

membered that the Government was never obligated to advance for construction purposes, or for the purchase of material and equipment, funds earmarked for working capital; and by March 6, 1953, it had been admitted by Westmoreland that there was an overrun of more than $500,000 in the major category of funds earmarked for construction and acquisition of new facilities, and Westmoreland had requested the Government to advance additional funds over and above its original commitment to take care of that overrun. Whether the Government was justified in refusing after the latter part of February, 1953, to honor checks drawn on overrun minor categories or not, a question which we did not decide in connection with the dispute between the Government and Westmoreland, and which we do not decide now, certainly it was contending that it was not required to honor such checks, and it was clearly not obligated to advance Westmoreland additional money over and above the amount originally contracted for. Under such circumstances, we do not think that the Government in refusing to countersign checks drawn on overrun categories acted so unreasonably or oppressively with respect to the creditors, to whom it owed no contractual duty whatever, as to deprive it of its right to priority here, if such right otherwise exists. As far as purely moral obligations are concerned, it seems to us that the obligations that the Government officials owed to the people of the United States in general to protect the public purse was equal to or greater than any supposed moral obligation that it may have owed to the creditors.

As to the withdrawal of the balance in Special Account No. 1, which was effected pursuant to Amendment No. 1 to the original contract, that also was a matter purely between Westmoreland and the Government. Moreover, although it may be conceded that the reason for the withdrawal of that balance was to prevent it from being seized by any one or more of the creditors, it should be kept in mind that the Government had a lien on that account whereas the creditors did not.

While the matter was not argued in the briefs, we feel that some reference should be made to a press release

which the Government issued contemporaneously with the execution of Amendment No. 1, copies of which release were circulated among the creditors. That release, in our eyes, would tend to create the impression that Westmoreland's application for additional funds was to be given early and favorable consideration, and that the Government had no thought of terminating the contract. Had the evidence showed that any of the creditors had extended credit to Westmoreland on the strength of the press release, or in reliance thereon had failed to take any steps available to them that would have protected their interests or improved their positions, an equitable argument could be made on behalf of such creditors. Such, however, is not the case. It is clear that no creditor extended credit to Westmoreland after the execution of Amendment No. 1, and there is no showing that any creditor refrained, on the strength of the press release, from taking any steps that it would have taken but for such release. Therefore, we consider that the release has no significance here.

Having disposed of the contentions common to all of the creditors, we now turn to a consideration of what we consider to be really the crucial issue involved in the dispute which is the subject of this memorandum, namely, whether or not under the Arkansas lien statutes that have been mentioned the lien claimants are entitled to priority over the Government, a question that we consider to be entirely one of Arkansas law. Prefatory to a discussion of that issue it may be said that counsel have not cited us to any case, nor have we found a case that we consider to be dispositive of said issue, although a number of Arkansas cases have been cited and discussed which are applicable here, as far as they go. In taking up the question of priority as between the Government and the lien claimants under the Arkansas statutes it will be desirable at the outset to quote the pertinent provisions of those statutes, and to state certain general principles announced by the Supreme Court of Arkansas in regard thereto.

The relevant parts of the Arkansas mechanics' and materialmen's lien statute, which has been cited and which

for simplification we shall refer to as the "Mechanic's Lien Statute",* are as follows:

> Ark. Stats., Section 51-601: "Every mechanic, builder, artisan, workman, laborer, or other person who shall do or perform any work upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection, improvement upon land, ... under or by virtue of any contract with the owner or proprietor thereof, ... upon complying with the provisions of this act, shall have for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre; ..."
>
> Ibid., Section 51-604: "The entire land, to the extent aforesaid, upon which any building, erection or other improvement is situated, including as well that part of said land which is not covered with such building, erection or other improvement as that part thereof is covered with the same, shall be subject to all liens created by this act to the extent and only to the extent of all the right, title and interest owned therein by the owner or proprietor of such building, erection or other improvement for whose immediate use or benefit the labor was done or things were furnished."
>
> Ibid., Section 51-605: "The lien for the things aforesaid, or work, shall attach to the buildings, erections or other improvements, for which they were furnished or work was done, in preference to any prior lien or incumbrance or mortgage existing upon said land before said buildings, erections, im-

* Actually, none of the creditors here is a "mechanic" in the strict sense of the term, or a "laborer". Most of the lien claimants are materialmen, although Latrobe Construction Company supplied only labor for the Westmoreland project, and Bragg's Electric Construction Company supplied both labor and material. All laborers, however, appear to have been paid in full, either by Westmoreland or by Latrobe or Bragg's, as the case happened to be.

provements or machinery were erected or put thereon, and any person enforcing such lien may have such building, erection or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter; provided, however, that in all cases where said prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements or buildings, then said lien shall be prior to the lien given by this act."

Ibid., Section 51-607: "The lien for work and materials as aforesaid shall be preferred to all other incumbrances which may be attached to or upon such building, ... or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements."

Ibid., Section 51-611: "The liens for work and labor done or things furnished as specified in this act shall be upon an equal footing, without reference to the date of filing the account or lien; and in all cases where ... sale shall be ordered and the property sold, which may be described in any account, or lien, the proceeds arising from such sale when not sufficient to discharge in full all the liens against the same without reference to the date of filing the account or lien, shall be paid *pro rata* on the respective liens; ..."

The relevant portions of the "Miners' Lien Statute" are as follows:

Ark. Stats., Section 51-701: "Any person, corporation, firm, association, partnership, materialmen, artisan, laborer or mechanic, who shall under contract express or implied, heretofore or hereafter made, with the owner or lessee of any land, mine or quarry, ... perform labor or furnish fuel material, machinery or supplies, used in the digging, drilling, torpedoing, operating, completing, equipping, maintaining or repairing any such ... mine or quarry, ...

shall have a lien on the whole of such land or leasehold interest therein, or oil pipe line, or gas pipe ... line, ... the buildings and appurtenances, and upon the materials and supplies so furnished, and upon said oil or gas pipe line, mine or quarry for which same are furnished, and upon all of the other ... buildings and appurtenances, including pipe line, leasehold interest and land used in operating for ... minerals, upon such leasehold or land or pipe line ..., for which said material and supplies were furnished or labor performed, whether the same are movable or not ..."*

Ibid., Section 51-704: "The lien hereby given against the land ... and the oil pipe line or gas pipe line, ..: situated thereon, upon the materials and supplies so furnished and upon said ... mine or quarry for which such materials were furnished, or labor performed ... shall be prior and paramount to and in preference of any and all subsequent liens, encumbrances and mortgages and except as hereinafter provided all liens established hereunder shall be equal dignity. The lien herein provided for shall attach to the machinery, material, supplies and the specific improvements made, in preference to any prior lien or encumbrance or mortgage upon the land or leasehold interest upon which the said machinery, material, supplies or specific improvements are placed or located, provided, however, that any lien, encumbrance, or mortgage upon the land ... at the time of the inception of the lien herein provided for, shall not be affected thereby; and the holders of such liens upon such land or leasehold interest shall not be necessary parties in suits to foreclose the lien hereby created."

Ibid., Section 51-706: "The provisions of this act shall not be construed to deprive or abridge

* While we are not here concerned with any oil or gas well or with any pipe line, the provisions of Section 51-701 and of other sections of the statute relative to pipe lines are included herein in view of our following discussion of Bennett v. Weis, 205 Ark. 198; and Superior Oil Co. v. Etheridge, 219 Ark. 289.

materialmen, artisans, laborers, or mechanics of any rights and remedies, now given them by law, and the provisions of this act shall be cumulative of the present lien laws of this State except as herein repealed or modified."

Ibid., Section 51-708: "Except as herein expressly provided, the lien hereby created shall be construed, established, preserved and enforced in like manner and in the same time as liens of mechanics are now construed, established, preserved and enforced, provided that where the labor performed, or material, supplies or machinery furnished was under an open, running account, the same shall be construed as a continuous contract, and the time within which the verified statement of the claim for lien shall be filed with the clerk of the circuit court shall be computed from the time upon which the last labor was in good faith performed, or the last material, machinery or supplies were in good faith furnished and the lien hereby provided for shall, when perfected, in the manner herein set out, be held in law and equity as security for the entire open, running account, whether the same has been partially closed by note or not . . ."*

From a reading of the first section of the Mechanics' Lien Statute (Ark. Stats., Section 51-601) it is clear that one who supplies labor, material, machinery or equipment for any building, erection or improvement upon land has a lien, as against the landowner (in this case Westmoreland), upon such building, erection or improvement and upon the land itself to the extent of one acre; it is equally clear from the fifth section of the statute, however (Ark. Stats., Section 51-605), that as against a prior mortgagee, such as the Government in this case, the mechanics' lien created by the statute extends only to the improvement itself, the mortgage on the underlying land retaining its superiority; moreover, where material or labor is fur-

* It should be said at this point that no question has been raised with regard to the perfecting in the manner prescribed by the respective statutes of any of the liens involved in this case.

nished for an improvement, before the mechanics' lien is held to be superior to a prior mortgage, it must appear that the new improvement is separate and distinct from existing improvements, or can be removed therefrom without injury thereto. The principles just stated have been recognized by the Supreme Court of Arkansas in at least the following cases: *Gunter* v. *Ludlam*, 155 Ark. 201; *Imboden* v. *Citizens Bank*, 163 Ark. 615; *Fine* v. *Dyke Bros.*, 175 Ark. 675; *Morrilton Lumber Co.* v. *Groom*, 176 Ark. 520; and *Barton Lumber & Brick Co.* v. *Caraway*, 178 Ark. 1034: Furthermore, the priority section of the statute itself recognizes by its provision for a separate sale of the improvement under execution that the priority of an existing mortgage on the underlying land is not to be disturbed; and that method of enforcing a mechanic's lien upon an improvement, as against a prior mortgagee, was held to be exclusive in *Morrilton Lumber Co.* v. *Groom*, *supra*. It should be noted, however, that such a lien may be held superior to a prior mortgage even as to the underlying land where a contractual vendor or a mortgagee requires a vendee or mortgagee to make improvements to the property, which would enhance the value of the security, while not advancing or agreeing to advance any funds for the making of such improvements. *Wildwood Amusement Co.* v. *Stout Lumber Co.*, 178 Ark. 977; *Peoples B. & L. Ass'n* v. *Leslie Lumber Co.*, 183 Ark. 800.

While ordinarily a mechanic's lien takes priority over a prior mortgage to the extent of the new improvement constructed on the land, an exception exists under Section 5 of the statute in cases where the "prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements, or buildings"; in such case the mortgage is entitled to priority both with respect to the land itself and with respect to the improvements erected thereon. Ark. Stats., Section 51-605; *Shaw* v. *Rackensack Apartment Corporation*, 174 Ark. 492; *Sebastian County Bldg & Loan Ass'n* v. *Minton* 181 Ark. 709; and *Ashdown Hardware Co.* v. *Hughes*, Ark. , 267 SW 2d 294. The cases just cited likewise hold that in applying Section 51-605 it is the purpose for which the loan is made, rather

than the use to which the money is actually put, that is controlling. Where a construction mortgage secures future advances, it is superior to intervening mechanics' liens where the making of such future advances is obligatory, but not where such advances are optional with the mortgagee. *Ashdown Hardware Co.* v. *Hughes, supra.*

In order for a materialman to establish a lien under the statute now being discussed, he must show that the materials furnished by him were actually used in the work; a mere delivery of materials to the site for the purpose of incorporation into the improvement is not sufficient to give him a lien under this statute, although such delivery constitutes *prima facie* evidence that the material was in fact used in making the improvement. *Meek* v. *Parker*, 63 Ark. 367; *Central Lumber Company* v. *Braddock Land & Granite Co.*, 84 Ark. 560; *Van Houten Lumber Co.* v. *Planters' National Bank*, 159 Ark. 535, 540; *Standard Lumber Co.* v. *Wilson*, 173 Ark. 1024, 1031; and *Sebastian Building & Loan Ass'n* v. *Minten, supra*, 181 Ark. at 712. That principle is applicable here, to the extent that the lien claimants rely upon Mechanics' Lien Statute, because it is stipulated that some of the material furnished by certain of the lien claimants was never incorporated into the improvements, and is now in storage at the plant site.

Turning now to the Miner's Lien Statute, it should first be noted that the remedy thereby provided for those who supply labor or materials for a mine is cumulative to that given by the Mechanics' Lien Statute, and that such remedy is to be construed, established, preserved and enforced as is that provided by the statute last mentioned. An examination of the Miners' Lien Statute, however, reveals that it is broader than the Mechanics' Lien Statute in three respects which are important here: First, whereas the rights in land of one who claims a lien under the Mechanics' Lien Statute are limited to a maximum extent of one acre, there is no such limitation found in the Miners' Lien Statute, and one who is entitled to the benefit of that statute has a lien on the whole of the land constituting the mine. Second, as has been pointed out, the Mechanics' Lien

Statute has a proviso to the effect that where a prior mortgage is given to secure advances of funds made to enable the property to be improved, the mortgage has priority over subsequent mechanics' liens; no such provision appears, however, in the Miners' Lien Statute, and we do not think that it can be read into it by interpretation. Finally, before a person is entitled to a lien under the Mechanics' Lien Statute for materials furnished, he must show that his materials went into the improvement; under the Miners' Lien Statute, however, one who supplies material, machinery or equipment for a mine that never becomes appurtenant to the realty is entitled to a lien on such items as he himself furnishes, but not to a lien on personal property furnished by others which never became attached to the land. *Bennett* v. *Weis*, *supra*, 205 Ark. at 202.

With regard to priority under the Miners' Lien Statute, persons who supply labor or materials for a mine have a lien which is prior to all subsequent encumbrances, but which is inferior to existing mortgages upon the land and upon items of property and equipment described in such mortgages.

In *Estep* v. *Blue Ribbon Coal Company*, 177 Ark. 83, the facts were that laborers worked in and about a coal mine which was being operated under a lease; the lease and certain machinery and equipment on the mine site were mortgagd to the First National Bank of Paris, the mortgage having been given prior to the time that the laborers performed any work. The Court held that the lien of the mortgage was superior to those of the laborers. After quoting the priority provision of the statute, the Court went on to say:

> "The statutory lien given to the miners for work done in operating the mine could not become paramount to a prior recorded mortgage unless the statute creating the lien manifests an intention to give it preference. . .
>
> "It is true it is expressly provided that the lien given the laborers shall attach to the machinery, material, etc., in preference to any prior lien, incum-

brance, or mortgage upon the land or leasehold interest upon which the said machinery, material, supplies and specific improvements are placed or located, provided that any lien, incumbrance or mortgage upon the land or leasehold interest at the time of the inception of the lien herein provided for shall not be affected thereby. The inception of the statutory lien could not have been before the material and supplies were begun to be furnished and the labor done, and it was not the intention of the statute to make the lien of the laborer or materialman superior to the lien of the prior mortgage upon the leasehold interest and equipment of the mine before the inception of the lien given the labor by the statute which expressly declares that such mortgage lien shall not be affected thereby. It was obviously not intended that the laborer or material furnisher should have a superior lien upon the leasehold and equipment of the mine to the lien of the mortgage existing at the inception of the statutory lien. In other words, at best, the statute, under a fair construction, cannot be held to intend the giving of a lien to laborers and material furnishers on the materials, improvements and equipment of the mine already installed and covered by a valid mortgage of the leasehold at the inception of the statutory lien, which could attach only to such machinery, material and specific improvements thereafter installed becoming superior to the mortgage lien therefor" (177 Ark. at 85-87).

And in *Roberts* v. *Tice*, 198 Ark. 397, 405, the Court, speaking of what is now Ark. Stats., Section 51-704, said:

"... In other words, a prior lien, encumbrance or mortgage on the land or leasehold only shall not come ahead of laborers and materialmen's rights to liens on the machinery, materials, supplies and specific improvements not specifically covered by the prior lien, encumbrance or mortgage, and justly so. If laborers and materialmen perform labor and furnish material to improve a leasehold already

covered by a mortgage or other encumbrance, their right to a lien on the improvements is paramount, but not so the leasehold."

Returning for a moment to the extent of the lien conferred by the Miners' Lien Statute, we desire to discuss briefly the cases of *Bennett* v. *Weis* and *Superior Oil Company* v. *Etheridge*, both *supra*:

In *Bennett* v. *Weis* one Thompson owned an oil and gas Lease in Lee County, Arkansas, and contracted with one Howard to drill an oil well thereon; Thompson agreed to pay Howard a certain sum for drilling the well, and also supplied three hundred feet of "surface pipe"; Howard borrowed a drilling rig from Bennett under a profit-sharing arrangement, and he also borrowed a steel derrick owned by the United States Oil Company. Weis, the plaintiff, was a dealer in oil, gasoline and other merchandise, and he furnished supplies and materials for use in connection with the drilling operation; his account being unpaid, he filed suit seeking to impress a miner's lien upon the lease, the drilling rig, the pipe, and the derrick, and he prevailed in the Chancery Court. On appeal the decree of the Chancellor was affirmed in part and reversed in part. The Supreme Court held that Weis was entitled to a lien on the lease and on the pipe, but not with respect to the drilling rig or the derrick because the latter was not appurtenant to the land.

In determining the extent of a miner's lien the Court said: "Our statute, by its terms, give materialmen and laborers a lien (a) on the land or lease; (b) on oil pipe lines; (c) on buildings and appurtenances; (d) on materials and supplies *furnished by the seller*; (e) on all other wells, buildings, appurtenances, etc." (205 Ark. at 202). [Emphasis added.] The Court further said: "It is difficult to draw a distinction between the machinery and the derrick, although some of the judges think such a distinction existed insofar as the record is concerned because of a failure to show that the derrick was only temporarily attached to the soil. All agree that the statute gives a lien on the pipe. Some of the judges think . . . that machinery, derrick and pipe were appurtenances" (Ibid. at 203).

In *Superior Oil Co.* v. *Etheridge*, Superior Oil Co. entered into a contract with one McSpadden to drill an oil well on a lease owned by it, and Etheridge furnished the labor and materials necessary to build a wooden access road to the drill site; it was held that Etheridge had a lien on the lease and on several thousand feet of oil well casing which Superior had purchased "in the regular course of business" and had "transported to and stored upon the property ... for its own use" (219 Ark. at 292-293). In holding that Etheridge had a lien on the pipe the Court said: "The case at bar has aspects like that of *Bennett* v. *Weis*, 205 Ark. 198, ... In that case Thompson owned oil and gas leases and made a contract with Howard to drill a well and furnish Howard 300 feet of surface pipe. Bennett let Howard have a drilling rig; and the question was as to the extent of the lien of the material supplier, Weis. We held that Weis had no lien on Bennett's rig; but we sustained the lien of Weis, the supplier, 'as to the surface pipe and the lease'. In short, we held that the lease and pipe of Thompson, the leaseholder, were subject to the lien of the supplier. Under the authority of that case the pipe on the drill site and also the lease of Superior ... were properly subjected to the lien of Etheridge" (219 Ark. at 296-297).

It is clear from a reading of the Bennett case that the Court there held that under the Miners' Lien Statute a supplier of materials has no lien on items of machinery which do not become appurtenant to the land, unless he supplies them himself. It should be noted, however, that the Court allowed Weis a lien on the pipe, some of the judges being of the opinion that it was an appurtenance, and the other judges apparently being of the opinion that it constituted a "pipe line" within the meaning of the statute. In the Etheridge case it is clear that the casing there involved was not appurtenant to the land since it was simply stored at the drill site, but, nevertheless, Etheridge's lien was held to apply to it, although he had not furnished it. This was done expressly on the authority of *Bennett* v. *Weis*; had the Court been of the opinion that Etheridge was entitled to a lien on all personal property on the lease, regardless of who supplied it, the effect of the decision would have been to overrule the general holding in the Bennett case, which

has been mentioned; the court obviously, however, did not intend to overrule or impair *Bennett* v. *Weis*. It seems clear, therefore, that a majority of the judges in the Bennett case, and all of the concurring judges in the Etheridge case felt that an oil well supplier is entitled to a lien on all pipe on the lease, whether appurtenant to the land or not, not on the basis that such a supplier is entitled to a lien on personal property on the lease in general, regardless of who supplies it, but on the theory that all pipe on an oil or gas lease is a pipe line within the meaning of the statute. On that basis what may appear to be a conflict between the two cases is readily resolved. We conclude, therefore, that the basic holding in *Bennett* v. *Weis* has not been impaired.

With the foregoing principles in mind, we now approach the task of applying those principles to the several kinds of property involved in this case so as to determine the relative priorities of the Government and of the creditors under each of the two lien statutes, each type of property being considered separately. Before doing so, however, we deem it well to point out that we are satisfied, although the creditors argue to the contrary, that under the terms of the contract between Westmoreland and the Government, the latter was required to make future advances of funds to the former in order to enable it to perform its contractual obligations, at least so long as Westmoreland performed its part of the bargain. Hence, the future advances contemplated in the contract and mortgages were obligatory in nature, and when made would relate back to the date of the mortgages.

The several types of property with which we are concerned are: (a) the lands purchased by Westmoreland, together with the improvements existing thereon at the time of the execution of the Government's mortgages; (b) the new improvements placed on said lands by Westmoreland pursuant to its contract with the Government; (c) personal property acquired by Westmoreland in connection with its proposed construction and with its proposed operations and now located on its lands and in the custody of the Receiver herein. The personal property just referred to may

be conveniently subdivided into three categories, namely: personal property, consisting of supplies and materials furnished by a number of the lien claimants here for incorporation into the proposed new plant, but which were never in fact incorporated thereinto; personal property acquired by Westmoreland from others than the lien claimants, exclusive of the automotive equipment to which the judgment creditors lay claim; and, finally, the automotive equipment just referred to, none of which, incidentally, was supplied by any of the lien claimants or any of the judgment creditors, and all of which, with the apparent exception of the Willys jeep referred to in the original mortgage, was paid for with funds advanced by the Government under the provisions of the contract.

Taking up first the question of the lands themselves and improvements existing thereon as of the date of the mortgages, and assuming for the moment without discussion that the Miners' Lien Statute is applicable in this case,* it is clear to us that as far as said lands and existing improvements are concerned the Government is entitled to priority over the lien claimants to the full extent of its claim. As stated, the Government's mortgages were executed on May 22, 1952, and at the same time the Government advanced to Westmoreland the sum of $418,600 to pay for such lands and improvements; at that time none of the lien claimants had supplied any services or materials to Westmoreland. Thereafter the Government made further advances to Westmoreland totalling more than $2,000,000.00, which sums it was required to advance under the contract, and the repayment of which was secured by its mortgages. As we have seen, neither the Mechanics' Lien Statute nor the Miners' Lien Statute accords priority to the lien created thereby over a prior mortgage as far as the land and existing improvements are concerned. As a matter of fact, the lien claimants concede that the Government is entitled to priority as to the land and existing improvements to the extent of the $418,600 which the Government advanced to pay for the same, and we do not believe

* As will be hereinafter pointed out, the Government takes the position that the Miners' Lien Statute does not apply to this case at all.

that they seriously contend that the Government is not entitled to priority as to this category of property to the full exent of its claim.

The only possible basis upon which the lien claimants could assert any priority with respect to the land and the improvements thereon at the time of the mortgages is the holdings of the Supreme Court of Arkansas in *Wildwood Amusement Co.* v. *Stout Lumber Co.* and *Peoples B. & L. Ass'n* v. *Leslie Lumber Co.*, both *supra;* but we are satisfied that both of those cases are readily distinguishable from the instant one.

In the Wildwood Amusement Company case the owner of a lease sold the same under a conditional sales contract, retaining title in itself until the purchase money notes were paid; as part of the contract the vendee was required to make certain improvements on the property at his own expense; the improvements were made but not paid for, and it was held that the mechanics' lien was superior to that of the vendor, apparently both as to the lease itself and as to the improvements thereon. The Court said:

> "... (A)s we have already stated, the contract of sale required the purchaser to make the improvements which were made, and at their own expense. The title to the whole property was retained in appellant, including all improvements to be erected on the lease ..., the effect of which was to constitute (lessee) the agents of the Wildwood Amusement Company for this purpose, as it required them to make these improvements to their property, and which was to remain their property until all the purchase money notes had been paid in full. Under these conditions we think it would have been no different had the Wildwood Amusement Company itself erected these improvements before the sale and required the purchasers to pay therefor in the contract of sale ..." (178 Ark. at 979).

In the Leslie Lumber Company case a contractual vendor sold certain property and required the vendee to make improvements thereon; the vendor did not originally

advance any money for the purpose of making improvements or agree to do so. After the improvements had been commenced, and after mechanics' liens had attached, the vendor did agree to advance certain funds to the vendee for improvement purposes and took a mortgage to secure the advance. It was held that the mechanics' lien was superior to the vendor's lien on both lands and improvements; the mortgage was not discussed since it was obviously inferior to the mechanics' liens which had attached prior to its execution. The basis of the decision was estoppel.

In the instant case we do not have a situation where a landowner enters into a contract of sale, retaining title to the property, and as a condition thereof requires the vendee at his own expense to make improvements, which would enhance the value of the security, without advancing or undertaking to advance any money himself for that purpose; nor do we have a situation where one agrees to advance funds for improvements, taking a mortgage as security therefor, after such improvements have already been commenced and after the liens of laborers and materialmen have already attached. The Government here never owned the land which Westmoreland purchased, but, on the other hand, advanced moneys to enable Westmoreland to buy the land from third persons, and obligated itself to advance additional moneys for the improvement of the property at a time when none of the lien claimants had furnished any services or materials. As indicated, the Leslie Lumber Company case was decided on grounds of estoppel; the Wildwood Amusement Company decision was based upon agency, but it also might well have been grounded on estoppel. Here, we have no elements of either agency or estoppel.

In taking up the question of priorities as to the improvements placed upon the lands by Westmoreland under its contract with the Government, we deem it well to consider first the argument, advanced by the Government, in its final brief, to the effect that the lien claimants here are not entitled to protection under the Miners' Lien Statute because the services and materials furnished by them were not furnished to a "mine" but rather to a

"beneficiation plant", which, the Government contends, is not a "mine" within the meaning of the statute.* While this argument of the Government has the virtue of simplicity, we have been cited to no authority which sustains it, and we have found no such authority. While it may be conceded that strictly speaking, a "manganese mine" consists only of the ore bearing lands, and that the "mining" of manganese is a surface operation, consisting in the removal of overburden and the digging of the exposed ore by means of earth moving machinery such as bulldozers, draglines, and the like, it does not necessarily follow that such a strict construction of the word "mine" is to be used in applying the Miners' Lien Statute. The statute itself provides that it shall be construed as is the regular Mechanics' Lien Statute; and as early as 1869 the Supreme Court of Arkansas in *Galbreath* v. *Davison*, 25 Ark. 490, 493-494, speaking of the construction that should be given to such a statute, said:

> "While it is true that this is a statutory proceeding, and cannot be construed to apply remedies beyond the declared intent and meaning of the Legislature, a large majority of the State courts have holden that (mechanics' lien statutes) are meritorious remedial laws, and should have a liberal interpretation. They should be so construed as not to defeat the spirit, true intent and meaning of the

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* The material portions of the Government's argument on this point are as follows: "... The statute was obviously written for the protection of laborers and suppliers concerned with the drilling oil and gas lines. It was only incidentally intended to have broader application. Under Section 51-701, a lien is given to any person who furnished labor or material 'used in digging, drilling, torpedoing, operating, completing, equipping, maintaining, or repairing' a 'mine'. The washing and concentrating plant constructed by Westmoreland ... has nothing to do with the **mining** of manganese. It is a beneficiation plant. The 'mining' is done with the use of draglines, shovels, and heavy hauling equipment. ... None of the labor or machinery and supplies used in the construction of the washing and concentrating plant were 'used in digging, drilling, torpedoing, operating, completing, equiping, maintaining, or repairing' of a 'mine'. The washing and concentrating plant could as well have been located in Little Rock, Arkansas, as at Cushman. It it had been so located, we doubt if any of the parties ... would have argued that

acts, and that such laws have been wisely enacted to encourage valuable and permanent improvements, and to secure the industrious mechanic his reasonable reward.

"Such laws were not intended to create liens upon mere personal chattels, but upon lands or things in some manner attached to the realty; not to embarrass commerce, or hinder the ready exchange of purely personal property, but to secure the erection of valuable structures and protect the interests of him who may furnish materials and build the same."

Other Arkansas decisions announcing the same view are: *White* v. *Chaffin*, 32 Ark. 59; *Buckley* v. *Taylor*, 51 Ark. 302; *Wildwood Amusement Co.* v. *Stout Lumber Co.*, *supra*; and *Rea* v. *Lammers*, 212 Ark. 792.

Bearing in mind the liberal construction that is to be given the statute, we do not believe that under the circumstances here presented any distinction should be drawn between the ore bearing lands of Westmoreland and the structures that were placed thereon or immediately adjacent thereto, including materials supplied for such structures, whether actually incorporated thereinto or not; and we reject the Government's argument in the connec-

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the lien created by Section 51-701 attached thereto. The 'mine' in a manganese operation consists of the ore-bearing lands. The statute does not say 'mining operation'; it does not apply to the different states in **refining** or processing ore **already mined.** ... Assuming that the materials, labor and supplies used in the construction of the washing and concentrating plant are held by the Court to fall within the language of Section 51-701, it is clear that said lien would cover only the land, the buildings, and appurtenances, ... If the mine had been **operated**, then this lien would have extended to the **'other'** buildings and appurtneances. However Westmoreland's mine was never operated ... With regard to the quonset building built by Westmoreland to house its business offices and operating shops, we further contend that although it is a building, it was not located upon the 'mine' and, further, it was not such 'other building' as was used in 'operating' for the production of manganese since said plant never got into operation" (Government's Final Brief, pp. 40-41 and 43).

tion. A reading of the contract discloses that the mere surface "mining" of manganese ore was not the sole, or even the primary object of the contracting parties; the real purpose of the parties in entering into the contract was the refining of raw ore, and the sale of the refined ore to the Government. In order for the purpose to be accomplished it was necessary that the beneficiation plant and other improvements be constructed; the contemplated operation was a continuous and integrated one, consisting not only of the digging of ore, but also of the transportation of the ore over Westmoreland properties to the plant, and the treatment of such ore. Keeping in view the purpose of the contract, it seems to us that the relationship between the ore body and the beneficiation plant was so intimate and direct, that the latter should be treated as a part of the mine. And, to our mind, the parties to this litigation did, in effect, so treat it during all of the course of the trial.

It may be true, as the Government suggests, that had the beneficiation plant been located at Little Rock, rather than at the mine site, it could not be fairly said that it was a part of the mine or covered by the Miners' Lien Statute. But the case postulated by the Government is not the case before us. The device of supposing an extreme case in order to demonstrate the unsoundness of a legal proposition is a helpful one in many instances, but it does not afford a safe guide for decision in all cases. While the parties might have agreed to construct the plant at Little Rock rather than at Cushman, they did not, in fact, so agree. The statute covers services and materials supplied for use in "equipping" a mine; and it seems to us that the parties here elected to equip the mine proper with a beneficiation plant and the other improvements disclosed by the evidence.

While the case of *Salt Lake Hardware Co. v. Chairman Mining & Electric Co.*, CC, Nev., 137 F. 632, cannot be said to be directly in point here in view of the difference between the statute there involved and that involved here, and in view of the difference in the problem that was before the Court in that case and the one presented here, nevertheless, some of the language contained in the decision is

at least persuasive that the improvements on the Westmoreland properties should be considered as a part of the mine, as we do consider them. In that case the Court said:

> "... It is the duty of the court to consider the object and purpose of the parties in installing the machinery, constructing the mill and improvements on the property, in order to reach a proper interpretation of the law. ... The mechanic's lien law should be so construed as to protect lien claimants of whatever kind, whether contractors, machinists, materialmen, or laborers, in securing their claim. ... It is to secure this end that courts have held that the lien laws should be liberally construed with a view to effect their object and promote justice ..."

"In *Thompson* v. *Wise Boy M. & M. Co.* (Idaho), 74 Pac. 958, 960, where a laborer at work as an amalgamator in a mill situate upon a quartz mine was held to be entitled to a lien on the mine, the court, in its opinion, said:

> "'If it be true that the mill was "affixed to the mine and was a part of the realty", ... then work in the mill was as much work in the mine as operating a hoist would be work in the mine. ... The milling of the ore extracted from the mine is as valuable to the mine owner as the extraction of the ore; and where it is milled upon the mine, and in a mill belonging to the mine, we see no more reason for denying the man a lien who works in the mill than for denying such lien to the man who operates the hoist or runs the cars. ... And we are very strongly inclined to the belief that the Legislature had the one in mind as much as the other when they enacted this law.'

"In *Keystone M. Co.* v. *Gallagher*, 5 Colo. 23, 28, the court said:

> "'Blodgett's claim is for furnishing material for and building a house or shop contiguous to the mine, and built for the use of the mine under the

direction of the mining superintendent. The house was owned by the owners of the mine, and was a part of the mining property, and we see no error in the decree in favor of Blodgett and for the sale of the house, together with the mine, for the purpose of enforcing the lien.'

"In *Williams* v. *Mountaineer G. M. Co.*, 102 Cal. 134, 142, 34 Pac. 702, 36 Pac. 388, it was held, under the lien law of California, that a claim of lien for materials furnished for the construction of a mill, tramway, boarding house, and reduction works upon a mining claim should be against the mining claim, and not the specific structure upon the mine. In the course of the opinion, the court said:

"'The mill is not a mere appurtenance for the mine. It is upon the mining claim, and, like the tunnels, tramways, and roads, is a part of the mine.'

"In *Gould* v. *Wise*, 18 Nev. 253, 264, 3 Pac. 30, 35, the court said:

"'The last point made is that there was no testimony showing how much of the land upon which the reduction works stood was necessary for its convenient use and occupation. When the reduction works were leased, the land determined by the Court as subject to the lien was embraced within the demised premises. And when the defendant acquired the property he purchased this land and the reduction works. This testimony showing that the land and reduction works had been leased together and sold together, tends to prove that the property subject to the liens has been treated as a unit, and used for a common purpose.'

"In view of the principles announced in these cases, and of all the facts established by the testimony, that the mill in question was erected upon the mining ground owned by the defendant; that the object in view was the erection and construction of the mill for the purpose of working the ores that were to be extracted from the group of mines de-

scribed in the lien; that the success and usefulness of the mill and of the mine were virtually dependent upon each other, and to that extent, at least, they were bound together for a common purpose—my conclusion is that the entire group of mines as mentioned in the lien and complaint should be held subject to the lien" (137 F. at 641-643).

Further support for our view is found in 58 C. J. S. "Mines & Minerals", Section 1(d), pp 16-17, wherein it is said: "As ordinarily used, the term 'mine' includes the bed or vein of ore into which the pit enters, ... and the whole series of shafts and subterranean passages and chambers connected with it, and also includes all parts of the property of the *mining plant*, on the surface or underground; which contribute, *under one management*, to the mining, and is not limited to mere subterranean excavations or workings." (Emphasis supplied.) The beneficiation plant and the other improvements were all located on lands which Westmoreland purchased with funds advanced by the Government and were certainly a part of Westmoreland's "mining plant", and all of the project was under one management.

Having determined that the improvements on the Westmoreland properties, as well as the ore bearing lands themselves, are covered by the Miners' Lien Statute, we reach the question of priority as between the miners' liens and the Government's mortgages. It will be recalled that in *Roberts* v. *Tice*, *supra*, the Court said, "... If laborers and materialmen perform labor and furnish material to improvement a leasehold already covered by a mortgage or other encumbrance, their right to a lien on the improvements is paramount, but not so to the leasehold." Were it not for the "after acquired property"* clauses contained in the Government's mortgages, there would be no question that, under the holding in the case last cited, the lien claimants would be entitled to priority as to the im-

* In the phrase "after acquired property clauses" we include Paragraphs A and B of Section I of the supplemental mortgage.

provements. The Government contends, however, that by virtue of the after acquired property clauses the improvements placed upon the properties were covered by the liens of its mortgagees, and that such liens related back to the date of the mortgages so as to give it priority. The Government's position in this connection is stated in its final brief, as follows: "The only question of any consequence is whether a mortgage of 'after-acquired' property specifically covers such after-acquired property and is entitled to the same protection as a mortgage of properties already in existence and owned by the mortgagor at the date of the execution thereof. The Government contends that property is as much 'specifically covered' within the meaning of the *Tice* case under an after-acquired mortgage clause as where said property is identified as presently existing property owned by the mortgagor." (Government's Final Brief, page 44.)

There can be no question that, as a general rule, in case of mortgages containing after acquired property clauses the liens of such mortgages attach to after acquired property at the time that title thereto vests in the mortgagor; where, however, if the property at the time it comes into the possession or ownership of the mortgagor is burdened with a mechanics' or miners' lien, that lien takes priority over the mortgage lien, although actually subsequent thereto in point of time. 36 Am. Jur. "Mechanics' Liens", Section 181, page 122; 57 C. J. S., "Mechanics' Liens", Section 201, page 759. Therefore, if the Government's mortgage liens and the miners' liens came into existence at the same time, the latter would take precedence over the former under the authorities just cited. *Oil, Bear Lake and River Water Works and Irrigation Co. v. Garland, et al.*, 164 U. S. 1, 19-24.

In resisting the application of the foregoing principle to the instant case, the Government has advanced a number of what appear to us to be highly technical arguments, but has failed to cite any authority to sustain the same. In view of the liberal construction to be given to the Miners' lien statute we do not believe that the rights of the parties should depend upon highly technical considerations or

upon any finely drawn distinctions. Not only is the Miners' Lien Statute to be liberally construed, but it should be given a practical construction, and one which will do justice as between the parties and prevent unjust enrichment. After all, it must be kept in mind that but for the services and materials supplied by the lien claimants, and others, there would be no improvements upon the property.

The Government first contends that its liens, by virtue of the after acquired property clauses, related back to the time that the mortgages were filed, whereas, as it contends, the liens of the suppliers had their inception at the time that their materials were delivered at the site. We are not so sure that a mortgagee's lien on after acquired property relates back to the time of the recordation of the mortgage; we have found no authority to that effect, and, on the contrary, in 59 C. J. S. "Mortgages", Section 185 (b), page 241, it is said that the lien of a mortgage can attach after acquired property only in the condition in which it comes into the mortgagor's hands; in Section 219 of the same Chapter, page 276, it is said that where one executes a mortgage on property, which he does not then own, but to which he subsequently acquires title, the mortgage attaches from the time that title is acquired. Nothing is said about "relation back" in either section. Assuming, however, that there is such a "relation back", the same is a fiction and should not be indulged in so as to defeat the rights of suppliers who furnished the very materials to which the mortgagee's liens attached. As was said in the *Bear Lake case, supra*, "... the actual fact will be considered and not the fiction" (164 U. S. at 231).

It is next contended that when Westmoreland acquired title to the materials furnished by the suppliers, the Government's mortgage liens became perfected, whereas the liens of the suppliers were inchoate until such later time as the latter took the statutory steps to perfect such liens. The priority of a mechanic's lien under Arkansas law, however, does not depend upon the quality of the lien as "choate" or "inchoate", but rather upon the time at which the lien attaches, which is when the first materials are furnished. See *Frank v. Wood*, 21 Ark. 10, 13-14.

The Government suggests that title to the materials supplied by the lien claimants vested in Westmoreland or in it* prior to the time that such materials were delivered to the Westmoreland properties, and for that reason the mortgage liens attached prior to the inception of the miners' liens; we do not agree. In the first place, we are not satisfied that the lien of a materialman under Ark. Stats. Section 51-701 does not arise until actual delivery at the mine site. In *Estep* v. *Blue Ribbon Coal Co., supra*, 177 Ark. at 86, it was said that the statutory lien for materials could not have its inception "before the material and supplies were begun to be furnished"; nothing is said about delivery at the mine site; at a matter of fact, the Court was apparently not there concerned with the claims of materialmen at all, but solely with labor claims; it would seem reasonable that the materialmen here "furnished" Westmoreland with the materials when they delivered the same to Westmoreland; clearly, the materials were furnished for use in constructing the improvements. In *Superior Oil Co.* v. *Etheridge, supra*, 219 Ark. at 297, fn. 6, the Court said: "When we say 'pipe on the drill site', we do not refer to some casing that was never unloaded on the drill site. Pipe in transit and never on the drill site was not subject to the lien; . . ." As the Government points out in another connection, however, the Court in the Etheridge case was not concerned with priorities; and, furthermore, the pipe referred to in the footnote which has been quoted was never delivered on the lease; here, all of the materials were delivered. But aside from that, and granting the Government's premises as to the time of inception of the miners' liens, we feel that to allow the Government's conclusion as to priority would be to take a hyper technical view of the statute that would be contrary to its beneficial intent and purpose, and we are unwilling to do so.

With particular regard to Latrobe Construction Company, which supplied labor for the construction of the

* Ark. Stats. Section 51-1006 provides that in the absence of a stipulation to the contrary, the mortgagee of personal property shall have the legal title thereto and the right to possession

plant, and with regard to Bragg's Electric Construction Company to the extent that it supplied labor, as opposed to materials, the Government argues that at the time their work was done, the Government's liens had already attached to the improvements and materials upon which they worked, and that, regardless of the priority accorded to the other lien claims, their particular claims should be denied priority. This attempted distinction between Latrobe and Bragg's, on the one hand, and the other lien claimants, on the other, is so highly technical and, to our mind, so inequitable and without basis in reason that we are unwilling to draw it.

Nor do we attach significance to the fact that under the provisions of Ark. Stats., Section 51-1006, the "legal title" to the materials furnished may have been in the Government, rather than in Westmoreland. Such title was in the Government, if at all, only for security purposes; the property was actually sold to Westmoreland, and it was Westmoreland's property, subject to the liens of the Government.

It is still further argued by the Government that in no event should the lien of a particular claimant be extended beyond "the particular part of the building or structure on which he worked or upon the particular part of such building created out of the materials supplied by said lien claimant", (Government's Final Brief, page 47); in the alternative it is urged that if it be held that a lien claimant's lien extends to the entire building on which he worked or for which he supplied materials, such lien could not apply to any other buildings or structures erected "prior to the date of the commencement of said claimant's lien", (Ibid., pp. 47-48). As stated, no authority is cited in support of those contentions, and we reject them.

It must be remembered that the statute now under discussion must be given a practical construction, and to try to draw all of the distinctions suggested by the Government in the arguments just mentioned would be highly impractical and would render the statute unworkable in a case of this magnitude. Those arguments ignore the fact that

all of the improvements with which we are here concerned were constructed as part of one integrated project, and we feel that all of those structures should be regarded as a unit for the purpose of determining priority. Of course, when the question of sale arises, it will be obviously desirable to sell the individual improvements separately.

The Government further argues that the lien of any supplies of materials incorporated into the real estate should be held to be prior to the Government's mortgage on the land only if the property could be removed "without injury". We cannot agree with that contention. When the Miners' Lien Statute is read in connection with Section 51-605, it is obvious that it contemplates that the improvements shall be severed and removed from the land, and such land certainly will not be damaged by the removal. Naturally, there are probably certain parts of these improvements, such as concrete foundations, which cannot, from a practical standpoint, be removed and as to such particulars the lien claimants will have no priority. The case, *Imboden* v. *Citizens Bank*, *supra*, referred to by the Government in this connection is not applicable here. In that case the Court was concerned with an extension to an existing improvement which could not be removed therefrom without damage thereto. We do not understand that any of the improvements involved in this case are connected in any way with any of the improvements that were in existence on the Westmoreland properties at the time of the Government's mortgage. We are here concerned with entirely new construction.

Our determination that the lien claimants are entitled to priority as to improvements constructed by Westmoreland after the date of the Government's mortgages by virtue of the provisions of the Miners' Lien Statute, which is broader than the Mechanics' Lien Statute, actually renders it unnecessary for us to discuss the question of priority as to such improvements under said last mentioned enactment. In the interest of completeness, however, we feel that we should state that it is our opinion that the Government would be entitled to priority under that statute as to such improvements, to the extent of the moneys

advanced for construction purposes, by reason of the proviso contained in Section 51-605, which has been quoted. It should be noted that in determining the Government's priority as to improvements under the mechanics' lien law we do not extend that priority to the $418,600 which the Government advanced for land purchase, but limit it to the amount advanced for construction purposes; the propriety of this course was suggested in the Government's final brief. Of course, the Government has priority with respect to the $418,600 advance under the prior mortgage provision of the Mechanics' Lien Statute, as far as the land itself is concerned. This view of the matter eliminates any necessity of a lengthy and detailed consideration of the several opinions rendered in the case of *Ashdown Hardware Co.* v. *Hughes*, *supra*, and of any effort on our part to reconcile the divergent views expressed in that case.

In determining how much of the Government's claim should be allowed priority with respect to the improvements on the property, we accept the testimony of Mr. E. H. Moore, who was Chief Accountant for Westmoreland; Mr. Moore no longer has any connection with Westmoreland or with any of the creditors; he was not cross-examined, nor was his testimony contradicted. Mr. Moore testified from a flow sheet that he had prepared showing conditions as they existed on March 31, 1953. While he did not testify as to how much money the Government had "advanced" for the construction purposes, he did testify as to expenditures that Westmoreland had made which we consider to be properly allocable to construction. He stated that $95,000 had been expended as fees for the engineering firm employed by Westmoreland to supervise the work; that $956,676.47 had been spent for building the washing and concentrating plant shown in Category No. 2 on the flow sheet; that out of an item of $40,835.31, appearing on the flow sheet as "Freight and Erection", roughly $17,700 represented freight on mining and hauling equipment, leaving a balance of $23,135.31 allocable to freight on material and supplies used in construction; that $313.65 was spent for building a certain road or for engineering services in connection with said road, and that $407.61 was

spent for the construction of a movable field office for the mining superintendent. His figures for construction total $1,075,533.04. In its final brief the Government states that $1,122,531.48 was "advanced" by the Government for construction purposes, and that $1,072,404.81 was actually "expended" for that purpose. It will thus be seen that there is a very close correlation between the Government's figures on actual construction expenditures and those testified to by Mr. Moore, the difference being only $3,128.23, which difference under the circumstances presented here we deem to be immaterial. Now, it is true that the Government's priority under Section 51-605 is to be determined by the amount of money which it advanced for construction purposes, rather than by the amount that Westmoreland spent for such purposes; but the difference between what the Government says was advanced and what Mr. Moore said was spent is only $46,998.44, a comparatively small figure in this lawsuit; and it must be remembered that pursuant to Amendment No. 1 to the original contract the Government recouped from Westmoreland's bank account the sum of $119,230.31. We feel, therefore, that substantial justice would be done by a determination that the Government's priority under Section 51-605 with respect to the improvements would amount to the $1,075,533.04 testified to by Mr. Moore.

As to the personal property furnished by several of the lien claimants and not incorporated into the work, we are satisfied that each of such claimants is entitled by virtue of the Miners' Lien Statute to a lien superior to those of the Government on such personal property as he himself furnished, but not as to the personal property furnished by others. *Bennett* v. *Weis*, *supra*. With respect to personal property not incorporated into the improvements and not furnished by any of the lien claimants, we hold that none of those claimants has any lien whatever upon such property under either the Mechanics' Lien Statute or the Miners' Lien Statute.

This brings us to a consideration of the prayer of the judgment creditors for leave to levy executions upon certain of the automotive equipment, belonging to West-

moreland and described in the respective answers of those creditors, which levy, if permitted, they contend will entitle them to the benefits of Section 60 of Act 142 of 1949 (Ark. Stats., Section 75-160), and will give them execution liens on such vehicles superior to the mortgage liens of the Government.

Act 142 of 1949 is the Arkansas version of the "Uniform Motor-Vehicle Administration, Certificate of Title and Antitheft Act"; it is a comprehensive statute, consisting of ninety-four sections, grouped into twelve separate articles. Subsection (a) of Section 60 of said Act provides that: "No conditional sale contract, chattel mortgage, or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, is valid as against creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrances with or without notice until the requirements of this article have been complied with." It is further provided that a certified copy of a title retaining contract or lien instrument affecting a vehicle covered by the Act shall be filed with the Arkansas State Revenue Commissioner, and that the existence of such lien shall be noted on the title certificate; and, further, that the Commissioner shall maintain an appropriate index of all lien, encumbrance or title retaining instruments filed with him. Act 142 of 1949, Sections 60 (b) (d) (e) (f) Section 61 of the Act provides that the filing of a certified copy of a lien instrument, and the issuance of a new title certificate evidencing such lien shall be constructive notice of all liens and encumbrances against the vehicle in question, as far as creditors of the owner and subsequent purchasers or encumbrancers, except those holding liens dependent upon possession, are concerned; and further provides that such method of giving notice of such liens or encumbrances shall be exclusive. It has been stipulated in the instant case that the Government has never filed, or caused to be field, copies of its original mortgage or of its supplemental mortgage with the Arkansas State Revenue Department.

It is the theory of the judgment creditors that Act 152 is applicable to the vehicles described in their respective answers, and that there was no compliance by the Government or Westmoreland with the requirements of Section 60 of said Act; that they obtained their several judgments, and in due course would have had executions issued and levied upon said vehicles, but that they were prevented from doing so by the fact that on January 22, 1954, we appointed a receiver to take charge of the assets of Westmoreland and to preserve them pendente lite; they contend that had such writs been issued and levies made, they would have become entitled to the benefits of Section 60(a) of Act 142, and that their execution liens would have been superior to the Government's mortgage liens. As indicated, they now ask us to permit them to have executions levied on said vehicles, notwithstanding the receivership.

In answer to those contentions, the Government takes the position that the permission sought by the judgment creditors should not be granted; and it argues further that even if we should grant said prayer and permit levies on the equipment in question, the execution liens would still be inferior to the Government's mortgage liens.

In taking up the respective contentions just mentioned it should be borne in mind that we are not here concerned with any question of the relative priorities of existing liens, as far as the judgment creditors are concerned. None of those creditors contends that at the present time he has any lien on any of Westmoreland's vehicles which is superior to the liens held by the Government. What said creditors are asking us to do is to permit them, after the Government commenced action to foreclose its mortgages, unquestionably good as between the parties thereto, to obtain liens on the vehicles in question by levy of execution thereon, and then to hold that the liens so obtained are superior to those of the Government. In other words they are now seeking to employ, subsequent to the commencement of this action, legal process and remedies so as to improve the position occupied by them at the time

the suit was filed. We do not think that this should be allowed.

In the early Arkansas case of *Hornor* v. *Hanks*, 22 Ark. 572, Hanks brought an action for the partition of certain lands; Russell, a defendant, had previously obtained a judgment against Hanks in federal court, and after the commencement of the partition suit, obtained a sale of the lands involved under an execution based upon his federal court judgment; Russell bid in the lands at the sale and attempted to set up the title thereby obtained as a bar to Hanks' action for partition. In holding that this could not be done the Court said:

> "The law is expressly written that the right of a plaintiff must be adjudicated upon as it existed at the time of the filing of his bill. . . . And this court has decided that where a bill disclosed a good cause of action but which had not accrued when the bill was filed, the bill could not be maintained. *Phebe* v. *Quillin*, 21 Ark. 499. And it would seem to be against the policy of a court of chancery to allow a defendant to cut off, or to modify the relief to which the whole case may show the plaintiff to have been entitled upon the condition of the case when the suit was begun, by the use of legal process or remedies after the defendant is brought into a court of equity, there to make his defense. For the object of a chancery suit is to administer entire justice, by a settlement of the whole controversy between all the persons affected by it, and this it can do only by engrossing the consideration of all the points of prosecution and defense that may be allowed to the respective parties. Hence Russell would have done well to have defended the bill of Hanks upon its deficiencies, and his own rights, as they were when the bill and his answer were filed. He could not, of course, have been deprived of any benefit that might attach to his levy of the lands made before the beginning of this suit; neither, on the other hand, does it follow that his execution sale against Hanks can assist his defense here . . ." (22 Ark. at 580-581).

Horner v. *Hanks* has been cited with approval in a number of later Arkansas cases, the most recent being *Massey* v. *Tyra*, 217 Ark. 970.

We have examined the cases cited by the judgment creditors on this phase of the case; and while they recognize the propriety in certain instances of permitting a levy of execution on property in the hands of a receiver, none of them goes so far as the judgment creditors would have us go here. As a matter of fact in *Coe* v. *Columbus, Piqua & Indiana R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518, 540-543, cited by the judgment creditors, the court considered a levy of execution on behalf of a judgment creditor upon property in the hands of a receiver to be good against the debtor, but not as against a mortgagee, even though the mortgage was defectively acknowledged; the view was taken that the mortgage was good as between the parties, and that a court of equity would have directed that it be perfected. It was said: "There was, then, a *lis pendens* which a subsequent claim could not defeat." The Court also took the position that the possession of the receiver was, in effect, the possession of the mortgagee. As we have said, the Government's mortgages were unquestionably good as between the parties, as far as the motor vehicles were concerned, and there is no more reason to permit the judgment creditors to perfect their liens on such vehicles so as to gain priority with respect thereto than there is to permit the Government to comply, or force Westmoreland to comply, with Act 142 of 1949, assuming that said statute is applicable here.

But aside from the foregoing, it seems to us that in view of the relief sought by the judgment creditors, the burden is upon them to establish the applicability to this case of Act 142, and, if that statute be applicable, then to further establish that we should, in the exercise of our discretion, permit the levies to be made.* And we feel

* With regard to the case of West v. General Contract Purchase Corporation, 221 Ark. 33, discussed in the briefs, it should be said that in that case the Court was called upon to determine the relative priority of a conditional sale contract and a valid and existing execution lien on a vehicle that had actually been seized by the sheriff;

that said creditors have failed to discharge their burden in both of the respects just mentioned.

Assuming for the moment that the several vehicles described in the answers of the judgment creditors are such as would normally be "subject to registration" under Act 142, a reading of Section 60(a) of said Act discloses that it does not apply to vehicles that are merely "subject to registration" but only to such vehicles as are actually "registered" under the Act. While the Act does not require that certificates of title be renewed annually, certificates of registration must be so renewed, (Act 142 of 1949, Sections 40-44); hence, a motor vehicle may be registered at one time and not registered at another time. As we construe Section 60(a), in order for a judgment creditor to obtain the benefit thereof, as against a mortgage, it must appear that the vehicle in question was, in fact, registered at the time such creditors obtained a levy of execution thereon. In the instant case there is no evidence that any of the vehicles in question are registered now, or that they were so registered when the suit was filed, or when the receiver was appointed, or when the judgment creditors filed their answers containing the prayers for relief which is now under discussion.

It is true that counsel for the Government state in their brief that, "The receiver in this case has registered those vehicles which the law requires him to register ..." (Government's Final Brief, p. 33). But such vehicles are not identified in any manner, and we have no means whereby we can identify them. It is also true that Mr. E. H. Moore, to whom we have previously referred, identified certain expenditures of Westmoreland as representing license fees on some of its automotive equipment; it appears, however, that those expenditures were made in

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and it was held in such case that the conditional vendor was required to show that it had complied with Act 142 of 1949. In the instant case, however, the judgment creditors have no liens on the Westmoreland's motor vehicles; they are asking us to permit them to acquire liens and then to award priority to the same; and under such circumstances, as stated, we feel that the burden is upon them to show that they are entitled to such relief.

July and August of 1952, whereas this suit was not commenced until January, 1954; and, of course, we cannot from Mr. Moore's testimony identify the particular vehicles upon which license fees were paid.

Not only have the judgment creditors failed to show that such vehicles are now registered under the Act or were so registered at any other particular time, but, on the other hand, the record in the case and the evidence that we have heard has shown that at all times pertinent hereto at least the great majority of such vehicles was not even "subject to registration". A motor vehicle is not required to be registered unless it is actually "driven or moved upon a highway", Act 142 of 1949, Section 32; and even if it be conceded that all of the vehicles described in the answers of the judgment creditors were adapted for operation on highways and that such was their contemplated use, the fact remains that after the execution of Amendment No. 1 to the original contract, which occurred on April 2, 1953, operations at the Westmoreland project were closed down and the equipment taken out of use. Since the filing of the suit, it seems clear that none of hte vehicles has been driven upon the highways with the possible exception of one or two that may have been used from time to time by the receiver; but, as stated, such vehicles are not identifiable from the evidence. It is also clear that for a number of months prior to the commencement of this action, the vehicles were, by and large, out of use.

Even if we were convinced, however, that Act 142 is applicable here, still the judgment creditors in our estimation have failed to establish that we should permit them to levy executions on the automotive equipment. We have already considered and rejected the "equitable contentions" advanced by the creditors in general, and we see no particular equities in favor of the judgment creditors which would move us to grant them the relief that they seek. On the contrary, we think that the equities are the other way.

The creditors who obtained their judgments prior to the filing of this suit apparently relied upon the liens of their judgments upon the Westmoreland real estate, and took no action toward obtaining liens on the personalty until after the Government had filed its suit to foreclose its liens, and had had the property seized by a receiver appointed by this court. The receiver has had this property in his possession for months, caring for and guarding the same, and expending substantial sums of money upon it, particularly upon the motorized equipment, all at the Government's expense, or at least with moneys advanced by the Government, which moneys it will, in all probability, never recover.

Equity favors the diligent and not those who sleep on their rights; the creditors who obtained judgments prior to the filing of this suit had ample time to have writs of execution issued and levied, but they failed to do so. The creditors who did not obtain their judgments until after this suit was filed have been, in our eyes, even more dilatory and stand on a less favorable footing from an equitable standpoint than those who at least reduced their claims to judgment before the insfitution of this action.

Under the circumstances revealed here, we would deem it most inequitable to give the judgment creditors the relief they seek. None of their money went into this equipment nor did they supply any of it; on the other hand, said equipment, with the exception of the jeep that has been mentioned, was bought and paid for with funds advanced by the Government, and the jeep itself was part of the security upon which the Government relied, and was specifically described in the original mortgage. Moreover, there is no showing here that any of the judgment creditors searched the records of the Arkansas State Revenue Department prior to extending credit to Westmoreland, or that any of them actually relied upon the fact that Act 142 had not been complied with. We, accordingly, decline to permit them at this time to levy execution on the automotive equipment; that means that, as far as personalty is concerned, they will be treated simply as unsecured creditors. Of course, their judgments are liens on the

Westmoreland lands located in Independence County, and are also liens on such lands located in Izard County to the extent that said judgments are docketed in that country; but said liens are inferior to those of the Government and to those of the lien claimants.

To summarize, we hold that the mortgage liens of the Government are superior to the claims of all creditors, as far as the lands of Westmoreland and the improvements existing thereon as of the date of the Government's mortgages are concerned; this priority as to this category of property extends to the full amount of the Government's claim for which it is entitled to judgment against Westmoreland. Next in order come the miners' liens of the lien claimants; third in line are the liens of the judgment creditors to the extent that their judgments are liens. At the bottom of the order of priority are the claims of the unsecured creditors.

As to the improvements erected upon the Westmoreland lands subsequent to the Government's mortgages, and which have become appurtenant to the land, the claims of the lien holders under the Miners' Lien Statute are entitled to priority over the mortgage liens of the Government and the judgment liens, which latter two classes of liens take priority, as between themselves, in the order mentioned. Finally come the claims of the unsecured creditors, which, when reduced to judgment, will, as a class, constitute fourth liens on the Westmoreland lands and improvements thereon.

As to particular items of personal property furnished by particular lien claimants, which have not been incorporated into the improvements so as to become appurtenant to the land, and which are identifiable, the individual lien claimants furnishing such items are entitled to priority with respect thereto under the Miners' Lien Statute, as against the Government, the mortgage liens of which will be second liens as to such items. No lien claimant, however, is entitled to any lien on any item of personal property not furnished by him.

As to items of personal property not furnished by any of the lien claimants and which have not been incorporated into the improvements so as to become appurtenant to the land, the Government's mortgage liens are superior to all of the other claims.

A foreclosure sale of all of the Westmoreland properties will be decreed, and the proceeds of such sale will be distributed in accordance with the relative priorities heretofore declared. Before concluding this memorandum we will comment briefly on the question of how this property should be sold:

It goes without saying that the properties should be sold in such a manner as to produce the highest possible return and so as to protect, insofar as possible, the legitimate rights and interest of the several classes of creditors, although from a practical standpoint it must be recognized that it is practically inevitable that both the Government and the lien claimants will sustain severe loss, and the probabilities are, to put it mildly, that the judgment creditors now existing, and the unsecured creditors who will become judgment creditors as a result of the instant proceedings will probably realize nothing from the sale. Moreover, since the Government has liens on items of personal property with respect to which none of the creditors have any lien claims, it seems equitable that Westmoreland's assets be, in effect, marshalled.

To achieve the results just mentioned, insofar as they can be achieved, we feel that there should first be sold the personal property upon which the Government has liens but with respect to which the other creditors have none. In view of the nature of this property, consisting principally of mining and hauling equipment, it should be sold item by item, and a record made of the amount for which each item is struck off. We include in this category the automotive equipment that has been discussed; with particular regard to the Euclid dump trucks, however, should any bidder manifest an interest in bidding for those vehicles as a group, they should be offered on that basis after they have first been offered one by one, and the bid

or bids should be accepted which will produce the highest return. The proceeds of the sale of such personal property should be credited against the amount of the Government's claim.

There should next be offered the identifiable personal property furnished by particular lien claimants, each lot being offered separately. The proceeds of the sale of each lot should be credited against the claim of the particular supplier who furnished such property.

Thereafter the improvements on the Westmoreland properties, constructed subsequent to the execution of the Government's mortgages, should be sold, each improvement being offered separately. The proceeds derived from the sale of the improvements should be credited upon the judgments of the respective lien claimants, all of them sharing *pro rata*. The purchaser or purchasers of the improvements will have the right to remove the same, or such portions thereof as are removable, within a reasonable time after confirmation, and we feel that six months would be a reasonable time. In the unlikely event that the proceeds of the sale of the improvements are more than enough to satisfy the judgments of the lien claimants, the balance should be credited against the Government's judgment.

Finally, the lands and improvements thereon existing at the time of the Government's mortgages should be sold, and the proceeds of such sale credited against the Government's judgment. Should such proceeds be more than sufficient to liquidate the Government's claim in full, together with all costs, then the overplus should be applied in accordance with the order of priority heretofore established.

Let a decree be entered in accordance with this memorandum and in accordance with the memorandum heretofore filed dealing with the controversy between the Government and Westmoreland. We feel that this decree should be drafted by the United States Attorney after full consultation, or consultations, with the receiver, who is thoroughly familiar with the properties involved, and who

will be appointed as special master to make the sale of such properties. After the degree has been drafted, it should be promptly presented to the Court for approval. We feel that ten days from this date should be sufficient to enable the United States Attorney to draft and present the decree, in view of the fact that the receiver has prepared a comprehensive inventory of the property involved.

This the 23rd day of September, 1955.

/s/ HARRY J. LEMLEY
United States District Judge

DECREE

(Filed in U. S. District Court on October 25, 1955)

I

This cause having been tried to the Court, and the Court having heretofore filed herein a "Statement of the Court" on June 30, 1955, and a "Memorandum" of the Court on the 1st day of August 1955, in which Statement and Memorandum the Court set forth its Findings of Fact and Conclusions of Law relating to the issues existing between the plaintiff, United States of America, and the defendant, Westmoreland Manganese Corporation, and the Court having also filed herein a "Memorandum Opinion Relative to Priority of Creditors' Claims" on September 24, 1955, in which said last-mentioned Memorandum the Court did set forth its Findings of Fact and Conclusions of Law relating to the issues existing between and among the parties hereto other than the defendant, Westmoreland Manganese Corporation, and the Court being well and sufficiently advised in the premises,

IT IS HEREBY CONSIDERED, ORDERED, AND ADJUDGED that the following parties have judgments against the defendand, Westmoreland Manganese Corporation, in the following amounts, to-wit:

A. In favor of the United States of America in the amount of $3,243,474.75, representing a principal indebtedness of $2,877,006.50, together with interest

on said principal sum until the date of this Decree, said interest being in the amount of $366,468.25.

B. In favor of the Arkansas Foundry Company in the amount of $48,858.65, with interest 6 percent per annum from March 24, 1953, until the date of this Decree.

C. In favor of Mill and Mine Supply Company in the principal amount of $8,312.69, with interest at the rate of 6 percent per annum from April 24, 1953, until the date of this Decree.

D. In favor of Crow-Burlingame Company in the amount of $4,297.32, with interest at the rate of 6 percent per annum from March 10, 1953, to the date of this Decree.

E. In favor of Latrobe Construction Company in the amount of $157,712.54, representing a principal indebtedness of $137,580.00 plus interest at the rate of 6 percent per annum from the date of the filing of its lien to the date of this Decree, said interest being in the amount of $20,132.54.

F. In favor of General Steel Products Company in the amount of $17,533.67, representing a principal indebtedness of $15,335.62 plus interest at the rate of 6 percent per annum from the date of the filing of its lien to the date of this Decree, said interest being in the amount of $2,198.05.

G. In favor of Jeffery Lumber Company in the amount of $2,475.79, representing a principal indebtedness of $2,157.55 plus interest at the rate of 6 percent per annum from the date of the filing of its lien until the date of this Decree, said interest being in the amount of $318.24.

H. In favor of Padgett Lumber Company in the amount of $4,445.99, representing a principal indebtedness of $3,866.20 plus interest at the rate of 6 percent per annum from the date of the filing of its lien until the date of this Decree, said interest being in the amount of $579.79.

I. In favor of Choctaw, Inc., in the amount of $3,452.99, representing a principal indebtedness of $3,086.29 plus interest at the rate of 6 percent per annum from the date of the filing of its lien until the date of this Decree, said interest being in the amount of $366.30.

J. In favor of Ira Sherrill in the amount of $416.37, representing a principal indebtedness of $362.50 plus interest at the rate of 6 percent per annum from the date of the filing of this lien until the date of this Decree, said interest being in the amount of $53.87.

K. In favor of Bragg's Electric Construction Company in the amount of $17,962.50, representing a principal indebtedness of $15,700.13 plus interest at the rate of 6 percent per annum from June 2, 1953, the date of the filing of its lien, to the date of this Decree, said interest being in the amount of $2,262.37.

L. In favor of Crane Company in the amount of $1,346.68.

M. In favor of B. F. Goodrich Company in the amount of $2,300.79.

N. In favor of White River Distributors, Inc., in the amount of $5,457.32.

O. In favor of White River Oil Company, Inc., in the amount of $54.29.

P. In favor of Batesville Equipment Company in the amount of $4,063.87.

Q. In favor of Industrial Electric and Supply Company in the amount of $3,078.62.

R. In favor of The Todd Company, Inc., in the amount of $854.31.

S. In favor of the Cummins-Diesel Company in the amount of $912.16.

It is further ordered and adjudged that the above-named parties have judgment for their respective costs.

expended herein. All of the said judgments rendered above shall bear interest at the rate of 6 percent per annum from the date of this Decree until paid.

II

A. The judgment of the plaintiff, United States of America, hereinabove rendered, is hereby ordered and decreed to constitute a first, prior, and paramount lien upon the following-described real property and interests therein located in Independence County and Izard County, Arkansas, together with all improvements existing thereon as of May 22, 1952, which improvements constitute all of the improvements on said real properties not hereinafter described and included under paragraph III below, to-wit:

(Descriptions of land omitted)

together with all and singular the tenaments, hereditaments and appurtenances belonging or in anywise appertaining to the premises above-described in 1 and 2, or any part thereof, as of May 22, 1952, and all reversions, remainders, revennes, rents, issues and profits thereof (including in the foregoing but not limited to all buildings, manufacturing plants, railroad sidings, improvements and fixtures located in, on or about said premises on May 22, 1952; all easements, rights of way, licenses and privileges to said premises belonging or in anywise appertaining, owned by the Westmoreland Manganese Corporation on May 22, 1952; and all the estate, rights, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, owned by the said Westmoreland Manganese Corporation on May 22, 1952, of, in and to said premises, property and rights and each and every part of the same, with the appurtenances), subject, however, to any and all existing easements, rights of ways, restrictive covenants, licenses, reservations of record, and grants for highway purposes.

(Descriptions of lands in which Westmoreland had mineral interests are omitted)

B. The judgments of the following parties defendant are hereby adjudged and decreed to constitute second liens upon the real property and improvements thereon described

in subparagraph A of this paragraph II of equal dignity, and said parties shall participate *pro rata*, according to the amounts of their respective judgments, in the surplusage from the sale of said lands and interest in real property, over and above the amount neccessary to satisfy the judgment of the United States of America, if there be any such surplusage, as hereinafter ordered and decreed, to-wit:

1. Latrobe Construction Company.
2. General Steel Products Company.
3. Jeffery Lumber Company.
4. Padgett Lumber Company.
5. Choctaw, Inc.
6. Ira Sherrill.
7. Bragg's Electric Construction Company.
8. Arkansas Foundry Company.
9. Mill and Mine Supply Company.
10. Crow-Burlingame Company.

C. The following parties shall participate in the surplusage from the sale of those lands and interests in real property described in subparagraph A of this paragraph II which are located in Independence County, Arkansas (but not in the proceeds of the sale of any lands located in any other county), over and above the amounts necessary to satisfy, first, the judgment of the United States of America and, second, judgments of the ten parties defendant named in subparagraph B of this paragraph II, if there be any such surplusage, in the following order:

1. State of Arkansas, assessment filed September 14, 1953, $279.98.

2. The following State judgments are of equal dignity:

a. Continental Gin Company, judgment obtained October 26, 1953, $40,727.76.

b. Koppers Company, Inc., judgment obtained October 26, 1953, $434.22.

c. Transall, Inc., judgment obtained October 26, 1953, $4,499.06.

d. Trans-World Airlines, Inc., judgment obtained October 26, 1953, $738.81.

e. Westinghouse Electric Supply Company, judgment obtained October 26, 1953, $1,784.03.

3. Gardiner-Denver Company, judgment obtained October 27, 1953, $458.00.

4. Central Scientific Company, judgment obtained December 18, 1953, $182.31.

5. The following State judgments are of equal dignity:

a. Carnegie Institute of Technology, judgment obtained March 4, 1954, $483.75.

b. Firestone Tire and Rubber Company, judgment obtained March 4, 1954, $6,392.99.

c. Batesville Truck Lines, Inc., judgment obtained March 4, 1954, $1,433.42.

d. Donley Pipe and Supply Company, judgment obtained March 4, 1954, $944.58.

e. Fisher's Scientific Company, judgment obtained March 4, 1954, $5,376.65.

6. The following State judgments are of equal dignity:

a. Bituminous Casualty Corporation, judgment obtained April 5, 1954, $6,830.92.

b. Clark Equipment Company, judgment obtained April 5, 1954, $5,458.14.

7. State of Arkansas, assessment filed August 16, 1954, $53.13.

8. Southwestern Bell Telephone Company, $925.38.

D. The following parties defendant and intervenors shall participate *pro rata*, according to the amounts of their judgments, in the surplusage from the sale of said lands and real properties described in subparagraph A of this paragraph II after the satisfaction of all prior claims

as hereinabove set forth in subparagraphs A, B, and C of this paragraph II, to-wit:

1. Crane Company.
2. B. F. Goodrich Company.
3. White River Distributors, Inc.
4. White River Oil Company, Inc.
5. Batesville Equipment Company.
6. Cummins-Diesel Sales Corporation.
7. The Todd Company.
8. Industrial Electric and Supply Company.

III

A. The judgments hereinabove rendered in favor of Latrobe Construction Company, Bragg's Electric Construction Company, Arkansas Foundry, General Steel Products Company, Jeffery Lumber Company, Padgett Lumber Company, Choctaw, Inc., Ira Sherrill, Mill and Mine Supply Company, and Crow-Burlingame Company are hereby declared, ordered, and decreed to constitute first and paramount liens of equal dignity upon the following-described improvements made to and upon the properties of the defendant Westmoreland Manganese Corporation after May 22, 1952, to-wit:

The partially completed pumphouse building, the cafeteria building listed as item OWA-309 on the Receiver's inventory, the multi-quonset building listed as item MSA-67 on the Receiver's inventory, and the partially completed processing plant buildings and structures erected or installed on the premises for use in connection with the processing of ore, together with all machinery, equipment, and fixtures installed therein or erected and affixed to the realty for use in connection therewith, all power poles, wiring, and equipment incident thereto erected or installed on the premises after May 22, 1952, all conveyor systems, pipe lines, and flume lines installed or erected on the premises after May 22, 1952, including, without limiting the generality of the foregoing, the property described in the Receiver's inventory under items numbered as follows: E-1 to E-14, inclusive, E-16 to E-104, inclusive, E-109 to E-224, inclusive, the four

unnumbered items on page 8 of Electrical Inventory, the second item on page 9 of Electrical Inventory, WB-1, WB-2, WB-4 to WB-21, inclusive, SS-1 to SS-4, inclusive, HMS-1 to HMS-25, inclusive, OF-199 to OF-205, inclusive, OF-207, OF-208, OF-210 to OF-215, inclusive, PH-1 to PH-5, inclusive, PH-18, PH-19, PH-69, PH-70, S-51, S-240, WA-88, WA-91 to WA-95, inclusive, C-42, C-43, C-44, C-47, C-100, C-101, ME-25, CL-144, CL-157, CL-202, MSA-65, OWA-123, WA-80, that portion of items WA-34 and WA-71 to WA-79, inclusive, that has been erected and installed on the premises. In the case of conveyor systems, items WA-71 to WA-79, inclusive, some of which are not completely erected, the items shall be sold as units and the proceeds prorated to the lien creditors in the proportion that the length of the erected portion bears to the entire length of the conveyor.

and said creditors shall participate in the proceeds of the sale of said properties *pro rata*, in accordance with the amounts of their respective judgments, after first crediting said judgments with the proceeds of the sales of properties upon which they are awardéd liens pursuant to paragraph IV below.

B. The judgment hereinabove rendered in favor of the United States of America is hereby declared, ordered, and decreed to constitute a second lien, subsequent and inferior only to the liens of the creditors enumerated in the last subparagraph hereof, in and to the properties described in said last subparagraph, and the said plaintiff United States of America shall participate in the overplus or surplusage, if any, resulting from the sale of said properties, as hereinafter ordered and decreed.

C. The parties to this action, heretofore enumerated in subparagraph C of this paragraph II above, shall participate in the surplusage from the sale of the annexed improvements hereinabove described in subparagraph A in this paragraph III, over and above the amounts necessary to satisfy, first, judgments of the ten parties named in subparagraph B of paragraph II above, and, second, the judg-

ment of the United States of America, if there be any such surplusage, in the same order of priority as set forth in subparagraph C of paragraph II above.

D. The parties defendant and intervenors, hereinabove enumerated in subparagraph D of paragraph II, shall participate *pro rata*, according to the amounts of their judgments, in the surplusage from the sale of the annexed improvements described in subparagraph A of this paragraph III after the satisfaction of all prior claims as hereinabove set forth in subparagraph A, B, and C of this paragraph III.

IV

A. The judgments of the following parties defendant are hereby declared, adjudged, and decreed to constitute a first, prior, and paramount liens upon the specific items of personal property furnished or supplied by the said individual defendants and more particularly described beneath the respective names of said parties defendant, to-wit:

Mill & Mine Supply Company

Property listed on Receiver's inventory as follows:

Items W-823, W-825, W-1089 to W-1092, inclusive, W-1094, W-1164 to W-1171, inclusive, W-1173 to W-1175, inclusive, S-213 to S-219, inclusive, S-261 to S-267, inclusive, OWA-69 to OWA-87, inclusive, OWA-89, PH-6 to PH-17, inclusive, PH-50 to PH-52, inclusive; OW-160, OW-204, OW-228, OW-276, OW-277, OW-278, OW-279, OW-282.

General Steel Products Company

Property listed on Receiver's inventory as follows:

Items WA-45 to WA-50, inclusive, WA-53 to WA-55, inclusive, WA-69 to WA-70A, inclusive, WA-81 to WA-87, inclusive, OWA-252 to OWA-266, inclusive, OW-90, OW-93 to OW-95, inclusive, OW-240, OW-316, OF-214.

Choctaw, Inc.

Property listed on Receiver's inventory as follows:

Items OWA-101, OWA-102, OWA-103, OWA-104, W-1143.

Crow-Burlinganme Company

Property listed on Receiver's inventory as follows:

Items W-92 to W-98, inclusive, W-105, W-162 to W-164, inclusive, W-169 to W-179, inclusive, W-188, W-195, W-205 to W-247, inclusive, W-252 to W-279, inclusive, W-287, W-288, W-502 to W-749, inclusive, W-768, W-769, W-771 to W-778, inclusive, W-817 to W-819, inclusive, W-1044 to W-1047, inclusive, W-1049 to W-1055, inclusive, W-1077 to W-1079, inclusive, W-1095 to W-1127, inclusive, W-1134, W-1135, W-1139, W-1140, W-1160 to W-1163, inclusive, W-1186, W-1192 to W-1196, inclusive, W-1222, W-1228 to W-1233, inclusive, W-1235 to W-1237, inclusive, W-1239, W-1241 to 1243, inclusive, W-1255 to W-1259, inclusive, W-1266 to W-1269, inclusive, W-1282 to W-1284, inclusive, S-1, S-16 to S-18, inclusive, S-20 to S-23, inclusive, S-25, S-27 to S-35, inclusive, S-41 to S-50, inclusive, S-52 to S-57, inclusive, S-68 to S-75, inclusive, S-105, S-108, S-113 to S-116, inclusive, S-162, S-166, S-168 to S-170, inclusive, S-172, S-175 to S-178, inclusive, S-180 to S-200, inclusive, S-202, S-203, S-204, S-163, S-167.

Arkansas Foundry Company

Property listed on Receiver's inventory as follows:

Items WA-41 to WA-44, inclusive, WA-51, WA-52, WA-58 to WA-68, inclusive, MSA 13 to MSA 17, inclusive, PH-21, PH-22, PH-54 to PH 64-A, inclusive, OW-38, OW-337 to OW-350, inclusive, W-1128, OWA-48 to OWA-56, inclusive, OWA-131 to OWA-251, inclusive, OWA-267 to

OWA-295, inclusive, OW-308 to OW-315, inclusive, OW-317 to OW-322, inclusive.

Jeffery Lumber Company

Property listed on Receiver's inventory as follows:

Items OW-297, OW-303, W-137.

Padgett Lumber Company

Property listed on Receiver's inventory as follows:

Items W-135, W-136, W-1048, W-1058 to W-1060, inclusive, W-1063, W-1141, W-1146 to W-1150, inclusive, W-1152, C-104, OW-25, OW-26, OW-37, OW-105 to OW-108, inclusive, OW-114, WA-2, WA-3, OWA-129, OWA-130, OWA-307, OWA-308.

B. The judgment hereinabove rendered in favor of the United States of America is hereby declared, adjudged, and decreed to constitute a second lien upon all of the properties described in subsection 1 through 7 of subparagraph A of this paragraph IV, subsequent and inferior only to the first lien in favor of the particular party defendant designated in each of said subsections as hereinabove set forth, and the said plaintiff United States of America shall participate in the surplusage or overplus, if any, resulting from the sale of said properties as hereinafter ordered and decreed.

C. The parties defendant and intervenors herein not specifically mentioned in subparagraph A or subparagraph B of this paragraph IV shall participate *pro rata*, according to the amounts of their judgments, in the surplusage from the sale of the properties described in the subsections of subparagraph A of this paragraph IV, if, in fact, there be any surplusage over and above the amounts necessary to satisfy the judgments of, first, the said parties mentioned in the subsections of subparagraph A of this paragraph IV and, then, the judgment of the United States of America, as mentioned in subparagraph B of this paragraph IV.

V

A. The judgment hereinabove rendered in favor of the plaintiff United States of America is hereby declared, decreed, and ordered to constitute a first and paramount lien upon all of the personal properties, monies, deposits, and choses in action, owned by the defendant Westmoreland Manganese Corporation and upon which specific liens are *not* in this decree awarded to others, including all of such items presently itemized and inventoried by the Receiver, and including the full amount of the deposit heretofore turned over to the Receiver by the Arkansas Power and Light Company but not limited thereto.

B. All of the defendants, with the exception of the Westmoreland Manganese Corporation, and all of the intervenors herein, shall participate *pro rata*, according to the amounts of their judgments, in the surplusage from the sale of the properties described in subparagraph A of this paragraph V, if, in fact, there be any surplusage over and above the amount necessary to satisfy the judgment of the plaintiff United States of America.

VI

If the judgments awarded in paragraph I hereof, or any of them, together with interest and costs of this action, be not paid within thirty days from this date, the Special Master, hereinafter named, shall, after he shall have advertised the time, terms, and place of sale for thirty days by publication in some newspaper in Independence County, Arkansas and Izard County, Arkansas, each having a bona fide circulation in said counties, by at least four weekly insertions, sell, at some location determined by the said Special Master, the land and properties enumerated and described herein, provided, however, that no properties other than lands located in Izard County, Arkansas, as hereinabove described, shall be advertised in said newspaper published in Izard County, Arkansas, at public outcry to the highest bidder on terms of cash, or one-fourth cash, one-fourth in thirty days, one-fourth in sixty days, and one-fourth in ninety days; deferred payments to be evidence by notes bearing interest at the rate of six per

cent per annum, and secured by a bond with approved corporate surety. A lien shall be retained on said lands and properties further to secure the purchase price thereof; provided, that if any item of property is purchased by a party to this action having a first lien upon said item of property for an amount not in excess of the judgment hereinabove rendered in favor of said party, and costs, then the said party may, in lieu of giving bond, credit the amount of its bid, less the cost of this proceeding, upon the judgment herein rendered, at the time of the confirmation of such sale, which credit shall be an extinguishment of the said judgment to the extent of such credit, but provided further, that, if the party's said bid shall exceed the amount of its judgment, less costs, it shall be required to give bond only for the overplus. Provided, however, that all such parties hereto who purchase properties sold hereunder, using their judgments as a credit on the purchase prices thereof, shall obligate themselves by bidding upon said properties, to pay in cash their proportionate shares of the receivership costs and expenses and the costs and expenses of the Special Master incurred in conducting the sales, to the extent necessary to fulfill the provisions of paragraph IX hereof.

Upon a sale of the said lands and other properties and confirmation thereof by this Court, all the right, title, claim, interest, equity, or estate of the defendant Westmoreland Manganese Corporation, and of all parties to this action in and to said lands and other properties, and every part thereof, shall be, and the same is hereby, decreed to be forever barred and foreclosed; and it is further ordered that said sales, authorized herein, shall constitute a perpetual bar to all right of redemption and to all other right, title, claim, and interest of the defendant Westmoreland Manganese Corporation, and the other parties hereto, in and to all of the property described in the preceding paragraphs of this decree.

E. L. McHaney, Jr., Esquire, heretofore appointed Receiver *pendente lite* herein, shall continue as such, pending further orders of this Court, and the Court doth also hereby appoint the said E. L. McHaney, Jr., Esquire,

Special Master of and for this Court to execute this decree and to make the sales required herein, and report his actions hereunder to this Court.

VII

The Special Master hereinbefore appointed is hereby directed to sell and account for, separately, the properties of defendant Westmoreland Manganese Corporation, as follows: First, all of the personal property on which the plaintiff United States of America has a first and paramount lien, as set forth in paragraph V above; second, the different lots of personal property on which individual creditor-defendants have first liens, as set forth in paragraph IV above; third, properties described and enumerated in paragraph III above; fourth, the properties enumerated in paragraph II above.

Subject only to the requirements set forth in this paragraph VII and the publication of notice requirements set forth in paragraph VI above, and the requirements set forth in the "Memorandum Opinion Relative to Priority of Creditors' Claim" filed herein on September 24, 1955, the Special Master is authorized to group properties of similar types into items for convenient sale and shall offer properties item by item and in lots according to liens awarded in subparagraph A of paragraph IV hereof and sell same for the highest of the bids thus obtained. The Special Master is hereby given authority to advertise (in addition to the publication of official notice as set forth in paragraph VI above) in such trade channels or other publications as he shall deem necessary or advisable in order to inform prospective purchasers of the sales to be conducted hereunder, and to hire such personnel and to incur such other expenses as shall be necessary or expedient in carrying out the terms of this Decree.

VIII

The Special Master hereinabove appointed will sell the properties enumerated in this Decree in such a manner as to produce the highest possible return. The purchaser, or purchasers, of the improvements annexed to the realty

and enumerated in subparagraph A of paragraph III above will have the right to remove same within six months after the confirmation of said sales by this Court. The lands and interests in real property hereinbefore enumerated in subparagraph A of paragraph II above may be sold in parcels or in bulk, the only limitation on such sales being that the lands and interest in real property located in Izard County should be sold separately from the lands and interests in real property located in Independence County, and the proceeds of such sales shall be accounted for separately.

IX

From the proceeds of the sales of properties as herein ordered, together with any other funds available for distribution, the Special Master shall, first, pay the costs and expenses of said sales, and, second, shall reimburse the United States of America in the sum of $40,000.00, which said sum was advanced by the United States of America to the Receiver for defraying the costs and expenses of the receivership. The balance of said funds shall be distributed in accordance with the priorities provided in this Decree. If proceeds of all sales are sufficient to pay anything on the claims of unsecured creditors, this fact will be reported to the Court, who will then issue orders concerning the apportionment of the costs, fees, and expenses of the receivership and the costs, fees, and expenses of the Special Master. If, however, the proceeds of said sales are insufficient to pay anything on the claims of said unsecured creditors, such costs, fees, and expenses shall be pro rated among secured creditors who are parties hereto in the following manner, to wit:

Each secured creditor's *pro rata* share of the fund available for distribution shall be determined as if there were no costs, fees, or expenses. From each share thus determined, there shall be deducted that proportionate part of the costs and expenses, not charged as above, as such share bears to the total fund available for distribution to said secured creditors.

The Court retains jurisdiction of this cause for the purpose of making such further orders as may be necessary to effectuate the provisions of this Decree.

Dated this 25th day of October, 1955.

/s/ Harry J. Lemley
United States District Judge

NARRATIVE STATEMENT OF THE EVIDENCE

(Rule 10(b))

On this appeal by the Government no issue is raised as to the validity or amount of any of the money judgments against Westmoreland Manganese Corporation in favor of the various appellees, or as to the propriety of the sale of Westmorelands' assets which sale has already taken place. Rather the sole issue is whether the district court correctly held that appellees had miners' liens under Arkansas statutes and that such liens were entitled to priority in payment from the proceeds of the sale of the improvements erected on Westmoreland's property after execution of the Government's mortgages and from the proceeds of the sale of personal property which had been furnished by appellees for, but were not incorporated into the improvements. The issue is to be determined in the following factual background:

On April 7, 1952, the United States, acting through the Defense Materials Procurement Agency, and Westmoreland Manganese Corporation entered into a contract by which the Government agreed to purchase from Westmoreland over a seven-year period 264,000 long dry tons of Manganese ore which were to be mined from ore deposits owned by Westmoreland near Cushman, Arkansas, and processed in a washing and concentrating plant to be constructed within a year by Westmoreland on its property. To assist Westmoreland in its undertaking the United States agreed to advance to Westmoreland from time to time as needed sums of money not to exceed $3,807,250, of which up to $418,600 was to be used to pay off the balance

owing on the mining properties, up to $2,788,650 was to be used for the acquisition and completion of the new facilities, and up to $600,000 was to be used for working capital requirements of the new facilities. The Government advances were to be repaid by withholdings from the purchase price of the manganese or as delivered. As security for its advances the Government was to be given unencumbered and unqualified mortgages covering the new facilities and all mining properties then owned by Westmoreland, and the contract provided (paragraph No. 5(d)):

> The Government shall have a lien paramount to all other liens upon the credit balance in the special account or accounts in which the advance payments may be deposited, upon materials produced by you from the facilities, and upon all other assets.

On May 22, 1952, the Government advanced the sum of $418,600, which was used to pay off the balance owed by Westmoreland on its then owned mining properties. On the same day Westmoreland executed a promissory note for the sum of $3,807,250 payable to the order of the United States, and also executed a Real Estate and Chattel Mortgage and a Supplemental Mortgage. These instruments purported to mortgage to the United States all the property of Westmoreland, then owned or thereafter acquired, whether such property be real, personal or mixed. Among the provisions of the Real Estate and Chattel Mortgage are the following:

> This mortgage shall constitute a first lien on the mortgaged property.
>
> • • •
>
> That this mortgage and the lien thereof shall extend to any additional premises, property and rights hereafter acquired; and that all such premises, property and rights shall forthwith upon acquisition thereof, and without further act, become subject to this mortgage and the lien thereof.

The Supplemental Mortgage, which was described therein as being cumulative to the Real Estate and Chattel Mortgage, provided in part:

I

For the purpose of making more explicit the description of certain properties encumbered by said Real Estate and Chattel Mortgage, it is here acknowledged by Mortgagor that said Real Estate and Chattel Mortgage was intended to, and does grant, bargain, sell and convey to Mortgagee:

• • •

(B) The manganese washing and concentrating plant (of an estimated daily capacity of six thousand long tons) which is to be constructed by Mortgagor and located in Independence County, Arkansas, approximately seven miles from the town of Cushman, at or near the site of the present plant mentioned in (A) aforesaid, together with all buildings, structures, erections, tanks, towers, conveyors, motors, boilers, engines, pipes, wiring, shafting, furnaces, slime pond facilities, sidings, switch tracks and all other machinery, equipment and personal property (including office equipment and automotive equipment) at any time hereafter comprising said plant, or used by Mortgagor in connection with the operation of said plant, or held or acquired by it for possible use in such respect.

(C) All other machinery, equipment and personal property (whether similar or dissimilar to any of the foregoing), wherever located, now owned by Mortgagor or at any time hereafter acquired by it.

• • •

IV

It being understood that the cost of constructing the proposed manganese washing and concentrating plant (to be erected as provided in Paragraph (B) of Subdivision I aforesaid) is to be paid

> out of the proceeds of the advances to be made by Mortgagee to Mortgagor as hereinabove set out, it is understood (and notice is hereby given) that the lien of the Mortgagee under said Real Estate and Chattel Mortgage and under this Supplemental Mortgage upon said manganese washing and concentrating plant (and the site thereof) will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien.

Both mortgage instruments were executed, acknowledged and recorded so as to comply fully with all requirements of the law of Arkansas. At the time of their recordation Westmoreland had no debts, other than that owing to the United States, which could be the basis for an encumbrance of its property.

Subsequently, Westmoreland began the construction of the new facilities contemplated by the contract and acquired much equipment for carrying on mining operations on its lands. And up to February 14, 1953, the United States advanced to Westmoreland the sum of $2,877,006.50. On or about February 21, 1953, the Government refused to countersign several checks drawn by Westmoreland on its special bank account, said refusal being on the ground that there were overruns in the categories of the construction account to which the checks were to be charged. Thereupon all construction operations were brought to a halt and have never been resumed. At that time the new plant was about eighty or eighty-five percent complete, and it had been determined that it could not be completed with the moneys that the Government had agreed to advance for that purpose, but that approximately $545,000 more would be needed. Creditors other than the Government but including appellees herein, held claims of over $370,000 for materials and services furnished to Westmoreland in connection with the construction of the new facilities contemplated in the contract of April 7, 1952.

On March 5, 1953, Westmoreland applied for the advance of a sum $545,800 in excess of the amount which the Government had agreed to advance for construction of

the new facilities, such sum being estimated as necessary for the payment of creditors and completion of the new facilities. On April 2, 1953, while that application was pending and just five days before Westmoreland was required under the contract of April 7, 1952, to have its plant completed and to be in production at a specified rate, Westmoreland and the United States executed an amendment to the contract. This amendment provided that the facilities should be placed in a temporary standby condition and that all operations should cease except for the continuation of a mineral drilling program. The Government agreed to make available funds for the payment of the costs of the drilling program and of maintaining the facilities in a standby condition. On condition that Westmoreland raised $15,000, the Government agreed to make available a sum not to exceed $29,080.42, the total to be used to pay accrued wages to Westmoreland's employees. The amendment also provided:

> 3. Notwithstanding any provision in the Contract to the contrary, the Contractor hereby grants to the Government the unqualified right and privilege of terminating the Contract at any time in the future up to commencement of production upon determination by the Government that termination of the Contract is in the best interest of the Government; the Contractor shall take no legal action to prevent such termination of the Contract by the Government, and disclaims any and all recourse by reason of such termination by the Government.

By the amendment Westmoreland waived the sixty-day period granted by the mortgage within which to remedy a breach of the contract provisions, and agreed that all moratorium provisions contained in the mortgage were without force and effect, and that upon termination of the contract it would grant immediate possession of the facilities to the Government. More than $75,000 was advanced by the Government under the provisions of the amendment, bringing its total advances to Westmoreland to more than $2,877,081.

On October 29, 1953, the United States terminated the Westmoreland contract and demanded possession of the facilities. When its demand was refused, the Government on January 8, 1954, filed this action to recover judgment against Westmoreland for the amount of its advances and to foreclose its mortgages. Upon motion by the United States for the appointment of a receiver *pendente lite*, the district court found as a fact that Westmoreland was insolvent, appointed a receiver, and ordered that said receiver take possession of all property of Westmoreland, whether real, personal or mixed. There was no appeal from that order. After trial, the district court adjudged that the United States was entitled to a money judgment and to foreclosure, and the correctness of the judgment in these respects is the subject of an appeal (No. 15,500) by Westmoreland. On this appeal, as has already been indicated, the Government seeks review only of those portions of the decree adjudging that, as to some of Westmoreland's property (i.e., the partially completed washing and concentrating plant and materials furnished for such plant, but not incorporated therein) the liens of appellees were superior to the lien of the Government's mortgages.

Prior to or during the trial the United States and appellees stipulated as to the amounts and the validity of appellees' respective claims against Westmoreland, and it was agreed that appellees had timely and properly asserted and preserved their claims for liens in accordance with the procedure prescribed by the Arkansas statutes. It was also stipulated that some materials furnished by certain appellees (Mill & Mine Supply Company, General Steel Products Company, Choctaw, Inc., Crow-Burlingame, Inc., Arkansas Foundry Company, Jeffery Lumber Company, and Padgett Lumber Company), although sold and delivered for use in the construction of the new facilities, were never incorporated into the improvements, but were stored at the plant site. By said stipulations none of the parties waived their claims of priority of liens, but stood on the allegations of their respective pleadings as to such priority.

With respect to Latrobe Construction Company, which held the contract for the actual construction of the washing and concentrating plant, this appellee did not furnish any materials used in the contruction, and its claim is based upon supplying labor, i.e., the payment of wages. The materials worked upon by Latrobe's employees were furnished by Westmoreland through suppliers including the other appellees.

Appellee Bragg's Electric Construction Company held the contract for electrical work on the Westmoreland project. As found by the district court, this appellee furnished both labor and materials. Under its contract, Bragg's employees performed much labor in installing and activating pumps, motors and other electrical equipment which Bragg's did not supply.

NOTICE OF APPEAL

(Filed in U. S. District Court on December 23, 1955)

The appellant in this case is the United States of America.

The attorney for appellant is Osro Cobb, United States Attorney for the Eastern District of Arkansas, 418 Federal Building, Little Rock, Arkansas.

The District Court on October 25, 1955, entered a judgment in this cause favorable in most respects to the contentions of this appellant. However, the judgment does give certain claimants under the Arkansas Miners' Lien Statute priority as against the United States as to certain assets of the defendant Westmoreland Manganese Corporation. This portion of the judgment is adverse to the United States and is the subject of this appeal.

An appeal from said judgment of October 25, 1955, is hereby taken by the United States of America, appellant, to the United States Court of Appeals for the Eighth Circuit.

UNITED STATES OF AMERICA

By /s/ Osro Cobb

United States Attorney for the

Eastern District of Arkansas

Dated December 23, 1955

RELEVANT DOCKET ENTRIES

Jan. 8, 1954	Complaint filed
Jan. 27, 1954	Hearing on Petition for Appointment of Receiver at Little Rock, before Lemley, J., at 9:30 a.m.
"	Findings of Fact and Conclusions of Law filed.
Feb. 23, 1954	Separate Answer and Cross-Complaint of Arkansas Foundry filed
"	Separate Answer and Cross-Complaint of Crow-Burlingame filed
"	Separate Answer and Cross-Complaint of Mill & Mine Supply Co. filed
Feb. 25, 1954	Separate Answer and Cross-Complaint of Padgett Lumber Co. filed
"	Separate Answer and Cross-Complaint of General Steel filed
"	Separate Answer and Cross-Complaint of Ira Sherrill filed
"	Separate Answer and Cross-Complaint of Choctaw, Inc., filed
"	Separate Answer and Cross-Complaint of Jeffery Lumber Co. filed

Mar. 1, 1954	Separate Answer and Cross-Complaint of Bragg's Electric Co. filed
Mar. 3, 1954	Separate Answer and Cross-Complaint of Latrobe Construction Co. filed
June 21, 1954	First Amendment to Complaint filed, with certificate of service
Oct. 27, 1954	Second Amendment to Complaint filed
Jan. 21, 1955	Government's Consolidated Reply to Creditor-Defendants' Answers filed, with certificate
Sept. 24, 1955	Memorandum Opinion filed relative to priority of Creditors' claims
Oct. 25, 1955	Decree filed in accordance with Court's Memorandum of June 30 and Aug. 1, 1955
Dec. 23, 1955	Notice of Appeal filed by Government. Copies to counsel by clerk
Jan. 17, 1956	Order filed, granting Government's Motion until March 23, 1956, to docket appeal

Office - Supreme Court, U.S.
FILED
SEP 30 1957
JOHN T. FEY, Clerk

SUPREME COURT

No. 516

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15547
CIVIL

UNITED STATES OF AMERICA — *Appellant*

v.

LATROBE CONSTRUCTION COMPANY, BRAGG'S ELECTRIC CONSTRUCTION COMPANY, ARKANSAS FOUNDRY COMPANY, GENERAL STEEL PRODUCTS COMPANY, JEFFERY LUMBER COMPANY, PADGETT LUMBER COMPANY, CHOCTAW, INC., IRA SHERRILL, MILL & MINE SUPPLY COMPANY AND CROW-BURLINGAME COMPANY — *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

PETITION FOR REHEARING

A. L. Barber
Donaghey Building
Little Rock, Ark.
E. DeMatt Henderson
Pyramid Building
Little Rock, Ark.
W. D. Murphy, Jr.
Batesville, Ark.
J. J. McCaleb
Batesville, Ark.
Attorneys for Appellees

FILED

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15547
CIVIL

UNITED STATES OF AMERICA — *Appellant*

v.

LATROBE CONSTRUCTION COMPANY, BRAGG'S ELECTRIC CONSTRUCTION COMPANY, ARKANSAS FOUNDRY COMPANY, GENERAL STEEL PRODUCTS COMPANY, JEFFERY LUMBER COMPANY, PADGETT LUMBER COMPANY, CHOCTAW, INC., IRA SHERRILL, MILL & MINE SUPPLY COMPANY AND CROW-BURLINGAME COMPANY — *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

PETITION FOR REHEARING

Come appellees, Latrobe Construction Company, Bragg's Electric Construction Company, Arkansas Foundry Company, General Steel Products Company, Jeffery Lumber Company, Padgett Lumber Company, Choctaw, Inc., Ira Sherrill, Mill & Mine Supply Company and Crow-Burlingame Company, as petitioners and present this, their Petition for Rehearing of the above entitled cause, and in support thereof respectfully show:

PREFACE

The appellees file this Petition for Rehearing fully recognizing the administrative burden which would be imposed upon the Court if carefully considered decisions were routinely reviewed merely at the request of a losing litigant. The opinion of the Court clearly reflects independent research and study beyond the points raised and authorities cited in the briefs on appeal. The fact that this is a case of first impression, and one which will probably become a landmark case, justifies appellees in earnestly requesting the Court to consider this their sincere Petition for Rehearing. While appellees do not concede that this case should be governed by "Federal Common Law", it is their contention that the results of the District Court trial should be the same no matter what law is deemed to govern.

POINT I

The opinion of the Court overlooks the fact that, stripped of all complicating factors, this litigation is nothing other than the trial of title to buildings and improvements located upon land in Arkansas.

(1)

The Court, at page 12 in its opinion, states:

> "The Government, by virtue of a valid contract, authorized by the Constitution and Statutes of the United States, bargained for and obtained a paramount lien upon WESTMORELAND'S PROPERTY."

The Court did not determine the title which Westmoreland acquired, for under the ruling such title was immaterial. The Court held that, irrespective of the fact that Westmoreland never acquired any property which was not subject to the liens of appellees, nevertheless such liens were ineffectual as to appellant because of a "Letter Con-

tract". This Letter Contract, and implementing mortgage, were negotiated by Government employees of somewhat less than cabinet rank. The basic effect of the Court's decision is to authorize Government administrative officers, presumably of any rank, to contract for delivery to the Government of titles of a greater dignity than those acquired by the person with whom the Government contracts. Specifically, in this case, the Court holds that a contracting officer of a temporary bureau could make a contract with Westmoreland whereby property to be acquired by Westmoreland, and which *upon acquisition* was subject or encumbered with liens, was to the Government to be deemed free of such liens.

Under no known law, either of any State or Federal Law, can a mortgagee under an after-acquired property clause acquire a title better or greater than that of the mortgagor. This result is, however, the final effect of the decision in this case. It cannot be doubted or argued but that the title which Westmoreland acquired from appellees was from the beginning burdened with statutory liens in favor of appellees. Neither can it be argued nor doubted but that Arkansas law governed the title to Westmoreland's property, acquired by Westmoreland as a result of improvements constructed or furnished by appellees. No one will contend that Westmoreland, in its various dealings with appellees, was governed by anything other than Arkansas law, and if this be true, then the *title which Westmoreland had* to pass to the Government under the after-acquired title provisions of the mortgage, was strictly a matter of Arkansas law.

While this point was argued in the lower court, it was not considered in this Court on appeal. The District Court's opinion is highly illuminating and cites the decision of the Supreme Court of the United States in *Bear Lake and River Waterworks Irrigation Co.* v. *Garland*,

164 U.S. 1, 41 L. Ed. 327, in which this highest of Federal Courts, stated:

> "On the contrary, the latter claim to bring their case within the rule recognized in this Court that even under the after-acquired property clause in a mortgage, if property be burdened with an encumbrance or lien at the very time of coming into the possession or ownership of the mortgagor, such encumbrance remains prior and superior to the lien of the mortgage, although it was actually subsequent thereto in point of time. * * * The Bear Lake Company, therefore, never had any legal or equitable title to the land over or through which the ditch for the canal was dug as against the Government until the ditch was completed. As the ditch was completed by the labor of the contractor, and the very title of the mortgagor thereto was itself created by his labor, *the lien attached to the property as it was created and came into being, and arose coincident with the ownership of the ditch by the mortgagor and the property came into the hands of the mortgagor burdened with this lien, which remained superior to that of the mortgage.* * * * The material fact to remember is that the sole title to the land or the right-of-way which the Bear Lake Company has, whether legal or equitable, is transferred to that company only by virtue of the work previously done upon the land by the contractors who thereby fulfilled the condition upon the performance of which such transfer or the right of such transfer depended. Under these circumstances, it is proper to say that the title to the land was transferred subject to the contractor's lien for the work which made the transfer possible and by means of which it was accomplished. * * * The very question in issue is whether the mortgage was a valid encumbrance upon any after-acquired land prior to these liens."

We submit that the rule as announced by the Supreme Court of the United States is that no mortgage can ever

obtain under an after-acquired property clause a title better than that which rested in the mortgagor. That rule is not followed in this case.

POINT II

The opinion of the Court overlooks the fact that appellees have no contractual relation with the Government and are not bound by the terms of the contract to which they were not a party.

The opinion of the Court as a practical matter holds that appellees who were not a party to the "Letter Contract" or implementing mortgage are to be divested of their statutory lien rights by virtue of such contract. We do not think the Court intended this holding, for such would be contrary to the Fifth Amendment to the Constitution of the United States which provides that no person shall be deprived of property without due process of law "nor shall private property be taken for public use without just compensation".

Again, it cannot be argued but that the title which Westmoreland acquired to the improvements on Arkansas land is to be determined by the contracts between Westmoreland and appellees for the construction of said improvement. For example: Westmoreland (not the Government) contracted directly with Arkansas Foundry (an Arkansas corporation) in Arkansas for the erection of structural steel, to be fabricated and erected in Arkansas. There is not a scintilla of Federal law involved in such a contract whereby Westmoreland's property was created, and the title which Westmoreland obtained to the steel in place in the improvement is dependent entirely upon the contract between Westmoreland and the Foundry. Until Westmoreland got some title it could not be subject to the mortgage, and the title it got is determined the "Westmoreland-Foundry acquisition contract" and not by

the Government's mortgage recitals. If this Arkansas law gives to appellees a valid lien, such is a vested property right, which cannot be defeated nor divested by a contract to which such appellees were not a party.

POINT III

The Court overlooked the fact that all of the cases cited by the Court in support of its holding were based upon specific Acts of Congress granting the United States liens. The conclusion of the Court: "We can see no reason why the Government should not be in as good a position under a valid contractual lien as it would be under a lien created by Statute" and which is, in fact, the foundation of the decision, is founded upon an extension of statutory law into the field of private contracts. Under the "Supremacy Clause", Congress may declare ineffective State Laws; but this power does not reside in every one of the thousands of Government employees routinely negotiating contracts. The rights of the *contracting parties* may be determined by "Federal Common Law", but the rights of strangers arising out of a different contract are to be adjudicated under that different contract. The Government cannot by its contract divest strangers to such contract of their statutory liens arising out of an entirely different contract.

POINT IV

The Court in the opinion, at page 8, held that "the issue of whether *federal common law* or Arkansas law should be applied was before the trial court".

In so holding, appellees urge that the Court overlooked the following facts:

(1) There are two separate appeals arising out of the Government-Westmoreland deal, No. 15500 in which Westmoreland is appellant and the United States is ap-

pellee, and No. 15547 in which the United States is appellant and Latrobe, et al, are appellees. The issues, as between the parties, although there was only one complaint filed in the District Court, were so diverse and unconnected that two appeals were considered necessary and were taken.

(2) The question of the applicability of Federal Law was never raised by the Government as governing any issue between the Government and these appellees.

(See statement of Trial Court in the hearing between the Government and the State on the question of taxes. This was sent to the Court of Appeals by the U. S. District Clerk.)

(3) The *brief* filed by the Government on the motion of Westmoreland to dismiss the Government's complaint wherein the Government stated, "the applicable law is Federal rather than State", referred to in this Court's opinion at page 6, was never referred to again by the Government during the trial of the case on the merits, nor was that brief referred to or mentioned by the Government in its Brief in Chief on this appeal. The first time the Government ever attempted to rely on this brief as notice to anyone that the Government contends that Federal Law applies to any phase of this case, or as controlling as to any issues between the Government and those appellees, was in its reply brief at pages 2 and 3.

(4) The brief itself (see appendix to the Government's Reply Brief) shows on its face that no reference is made to these appellees and no copy was served on any of the appellees on their counsel. The only contention made by the Government in said brief as to the applicable law is that it governs any issue as between the contracting parties, viz., the Government and Westmoreland and no

contention is made that this applies as to rights of third parties, such as these appellees.

(5) The trial briefs filed in the Court below by the Government in support of its claim of priority, under its mortgage, to the Statutory lien claims of the appellees (these briefs were all forwarded to this Court by the Clerk of the District Court as part of the record on appeal) do not mention the case of *United States* v. *Allegheny County*, 322 U.S. 174, 182, and the Government did not rely on that case, but argued and attempted to rely solely on the law of Arkansas.

(6) There is, in our jurisprudence, no "federal common law".

"Mr. Justice Storey long ago wrote, recognizing the non-existence of federal common law, this trenchant pertinent passage in *United States* v. *State Bank of North Carolina*, 1832, 6 Pet. 29, 31 U.S. 29, 35, 8 L. Ed. 308:

> 'The right of priority of payment of debts due to the government, is a prerogative of the crown well known to the common law. * * * The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes.'" *United States* v. *White Bear Brewing Co.*, 227 F. 2d 359, 366.

(7) The government in this case must rely on federal statutory enactments, and the Act under which it was acting in its Contract with Westmoreland, the Defense Production Act of 1950, 50 U.S.C. Appendix § 2061 *et seq.*, did not in terms give it any prior liens, nor has the government ever shown or claimed such power or right under any "terms and conditions" "deemed necessary" by the President.

POINT V

At page 9 of the opinion this Court states:

"We believe that the priority of liens involved in this appeal should be determined by *federal law*".

The appellees submit that in so holding the Court overlooked:

(1) That the Contract and the mortgage implementing the Contract on which the Government relies were written, executed and recorded with Arkansas law and the requirements of that law in mind.

(a) The form of mortgage is an Arkansas form, meeting the requirements of Arkansas law.

(b) The acknowledgment is the Arkansas Corporation form of acknowledgment.

(c) The mortgage was filed for record in the counties in Arkansas in compliance with the Arkansas law. §§ 16-101 and 51-1001 Ark. Stats., 1947 Ann.

(d) Special Arkansas Counsel was employed by the Government for advice re Arkansas law and procedure as to mortgage in Arkansas, and more especially for advice as to liens and the effect of Arkansas lien law on mortgaged property, that is the priority as between statutory liens and mortgage liens.

(e) The opinion given by this special counsel employed by the Government clearly shows the Government in contracting with Westmoreland, had in view the Arkansas law re liens of material-men and was trying to guard against them as far as it could by a contract with *Westmoreland*.

"TRIAL EXHIBIT NO. 22

Letter from Harry E. Meek
Dated June 19, 1952

Little Rock, Arkansas

"'Mr. Albert H. Green,
General Counsel,
Defense Materials Procurement Agency,
Washington, D. C."

* * * *

'With reference to liens which may hereafter result from the construction of the plant, please note the following: Under our Arkansas Statute where a mortgage is given to secure a loan to finance the construction of an improvement, the mortgage takes priority over any statutory liens created in connection with the construction of such improvement. See *Sebastian Bldg. & Loan Assn.* v. *Minten*, 181 Ark. 700; 27 S.W. 2d 1011. However, in a situation of this kind I have always been afraid to rely 100% on this statute. It could be argued that this statute applies only when the proceeds of the loan are disbursed in one lump sum before construction commences, and does not apply to situation where the mortgage proceeds are advanced from time to time as construction progresses. Therefore, I think that it would be advisable if, in connection with each future disbursement, some precaution be taken by the government to protect itself against currently accruing construction liens. Most certainly the Government's mortgage might *fail as against removable installations of machinery which* had been purchased under conditional sales contracts.'"

(Appellees Supplemental Record pp 11-12)

(f) This is further shown to be a fact when this special counsel deemed it necessary to have a supplemental mortgage containing the provision quoted by this Court in the opinion at page 5.

POINT VI

The Court at page 12 of the opinion resolves the equities in favor of the United States, such holding being based upon the fact that the Government's mortgages were *recorded* before any labor or materials were furnished by any of the appellees. The appellees submit that in so holding this Court overlooked:

(1) That the Arkansas Miner's Lien Law was in existence and in force and effect long before the Government's mortgage was executed and recorded and that the Government and its attorneys were fully aware of it and its import and effect upon priorities as between a mortgagee and Miner's Lien Claimants;

The Miner's Lien Statute is Act 615 of 1923; Sections 51-701 to 51-708 inclusive, Ark. Stats., 1947 Ann.

In passing upon a similar contention or situation in the case of *Bear Lake & River Water Works Irrigation Co. v. Garland*, *supra*, the Supreme Court said:

> "* * * It is also said that the mortgagee occupies a position superior in equity to that of the Corey firm because the mortgage was executed and on record a long time before the firm did any work upon the ditches, and it must have known, or at any rate notice from the record will be imputed to the firm that the mortgage was in existence. * * * Upon the same principle, the mortgagee would know that it could acquire no lien upon this property superior to that of the lienors, and that the title to the property created by the lienors would come to the Bear Lake Company burdened with their lien. It is plain that in this light the equity of the lienors is superior to that of the mortgagee, and their lien should, if possible, be preferred."

(This quotation also supports the position of appellees in their Point I.)

(2). That the Government had not paid one cent on the material of appellees which was in original packages and in the warehouse, unused, and that to allow the government to take this property would be so inequitable as to shock one's sense of equity:

With all due respect for the Court, appellees feel impelled to call the Court's attention to the fact that in arriving at the conclusion that "this fact (the prior recording of the mortgage)—is an answer to the equitable claims of the appellees" this Court seems to be relying on Arkansas law.

CONCLUSION

In conclusion appellees respectfuly submit that, for the reasons hereinabove stated, the opinion should be withdrawn and a rehearing granted, and that the judgment appealed from by the appellant should be affirmed. Appellees further pray that the issuance of any mandate be stayed until the Court shall have passed upon this Petition for Rehearing, and should this Petition be not granted that the issuance of a mandate be further stayed until petitioners may file a Petition for Writ of Certiorari in the Supreme Court of the United States.

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Attorneys for Appellees

CERTIFICATE OF COUNSEL

The undersigned attorneys, A. L. Barber and E. DeMatt Henderson, hereby certify that this Petition for Rehearing is submitted in good faith and that they believe it to be meritorious.

A. L. Barber further certifies that he is authorized by W. D. Murphy, Jr., Attorney for certain of the Appellees and Petitioners, who is absent from the United States, to sign this certificate for and on his behalf.

A. L. Barber
E. DeMatt Henderson
W. D. Murphy, Jr.

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No. 516

SUPPLEMENTAL RECORD OF APPELLEES.

Office-Supreme Court, U.S.
FILED
SEP 30 1957
JOHN T. FEY, Clerk

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,547

CIVIL.

UNITED STATES OF AMERICA,
APPELLANT,

vs.

LATROBE CONSTRUCTION COMPANY, BRAGG'S ELECTRIC CONSTRUCTION COMPANY, ARKANSAS FOUNDRY COMPANY, GENERAL STEEL PRODUCTS COMPANY, JEFFRY LUMBER COMPANY, PADGETT LUMBER COMPANY, CHOCTAW, INC., IRA SHERRILL, MILL & MINE SUPPLY COMPANY AND CROW-BURLINGAME COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,547

CIVIL.

UNITED STATES OF AMERICA,
APPELLANT,

vs.

LATROBE CONSTRUCTION COMPANY, BRAGG'S ELECTRIC CONSTRUCTION COMPANY, ARKANSAS FOUNDRY COMPANY, GENERAL STEEL PRODUCTS COMPANY, JEFFRY LUMBER COMPANY, PADGETT LUMBER COMPANY, CHOCTAW, INC., IRA SHERRILL, MILL & MINE SUPPLY COMPANY AND CROW-BURLINGAME COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

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[fol. 2] (Excerpt from Transcript of Testimony.)

GEORGE B. HOLDERER, Witness for Government, testified: (Tp. p. 184)

The Court: "Gentlemen: I am going to make this statement, and then it (Tr. p. 184) is up to you as to your own stipulations. Supppose a situation like this arises, just suppose that Westmoreland owes Latrobe $50,000.00 for work and material on certain buildings, and that building is concrete and steel structure and that cannot be removed from the land from a practical standpoint: within that building there might be all kinds of fixtures that could be removed from the building, I mean from a practical standpoint they could be removed from the building, because I don't think the technical law of fixtures applies here. In other words, if Latrobe can go in there and take its stuff out, that it would have a lien prior to the Government; of course, if it can't take it away, if it is concrete and steel and you just can't remove it, that lien would not do you any good. If it were a wooden structure, however, something that could be removed or rolled off the land, then it would be a different proposition. Under certain conditions, you know there is a different statute with material-men's lien and Mechanic's Liens are concerned, the statute provides a small tract of land to go with the lien; that is not the case in a Miner's lien; this is not quite as simple as it seems to work, this whole proposition."

My name is George B. Holderer and my address 316 North Adams St., Arlington, Va. (Tr. p. 185) I am a mining engineer on the staff of the Committee on Interior and Insular Affairs, of the United States Senate and have been such for two years. I have had mining engineering, graduated from School of Mines at Columbia University and for close on to fifty years have been closely identified with

probably every phase of the mining industry, both as operating manager, consultant, connected with the financing of mineral properties, my activities ranging over the entire western hemisphere, except Alaska. The Committee on Interior and Insular Affairs has jurisdiction of the Executive end of the Government that has to do with the Depart-[fol. 3] ment of the Interior and we have five sub-committees. (Tr. p. 186) During the past thirty years I have been employed as manager by General Chemical Co. as manager of one of the largest mines in Canada; was with Air Reduction Co. for ten years on research work having to do with mining engineers and developed liquid oxygen explosives. As consulting engineer I worked for dozens of indiduals and companies such as Anaconda Mining and International Nickle. During World War II I served in the War Production Board in the Copper division and at end of war resumed private consultant (Tr. p. 187) work. At beginning of 1951 I was asked to come into the Defense Minerals Administration. Defense Materials Procurement Agency, known as D.M.P.A. in 1951 became a part of General Services Administration. Mr. Young was a deputy administrator and I became Chief of Ferro-Alloy Division. (Tr. p. 188) The Westmoreland project was assigned to me in February, 1951, it having come to the attention of my Chief, Mr. Bradley, late in 1950. I was concerned with alloys that go into making of steel etc. My job was to examine Westmoreland's application and see what was needed to make it effective. I visited the project in April to get the lay of the land and nature of conditions, spending one week in April (Tr. p. 189) 1951. I dealt almost entirely with the attorneys for the company in Washington. The Batesville area has been known for a hundred years as a producer of manganese in a small way. The geological survey stated an immense area was covered with a low grade material carrying manganese. When I visited the property in 1951 I found the company had a buldozer making a cut through part of the property; that was followed by a man with water (Tr. p. 190) pails who would pick up the lumps of high grade ore, some run as high as 50%, but it was not a large scale operation. (Tr. p. 191). Mr. Howard Young on May 9, 1952, called a meeting with myself, Mr. Sherman, Mr. Ford and all the other technical men (Tr. p. 219) in which Mr. Young expressed doubt as to the ore reserves,

[fol. 4] but that no Government money had been spent, although the contract was signed, and asked all present to state any objections to the project. No one present objected. (Tr. p. 220) There were some 18 or 20 present in this meeting representing both the Government and the Company, and Mr. Young said "once we have entered into a contract with the company we do not propose to "breathe down your neck", meaning that we do not intend to supervise your operation; that, I was aghast at that statement. (Tr. p. 221) With reference to the report I made to the Contract Negotiations Division in which I said "this requires the closest supervision" (Tr. p. 223) which related to building of a plant by the Westmoreland Corporation for the mining activity; this report going through Mr. Sherman, Mr. Ford, Mr. Lyons and on up to Mr. Young. (Tr. p. 224) The purpose of the drilling operations was to show presence of ore over a large area, and it was contemplated that ore would be removed from a large area of the Westmoreland holdings as a single unit in order for the Government to receive its money back. (Tr. p. 225) There could not be any mining or recovery of ore until the mill was in operation.

"Q. And the mill would be an integral part of this mining enterprise."

"A. A very, very necessary part."

"Q. Perhaps the most important part?"

"A. I won't say the most important, but you cannot operate a mine without a mill, you can't operate a mill without a mine, the two put together." (Tr. p. 227)

[fol. 5] ARTHUR L. SHERMAN, witness for United States:

Cross-Examination.

By Mr. Murphy, Attorney for Creditors:

(Transcript pages 428 to 451, inclusive)

Westmoreland plant was the only manganese plant I know of built with Government advances. After the April 7, 1952, contract agreement no Government representative

was placed at the plant site, because Mr. Harold Young refused requests for same. (Tp. 429) With respect to the Westmoreland plant "I was vested with authority with what we call the administration of the contract, which was in effect making reasonably sure that the provisions of the contract binding on the Government were carried out, and the provisions binding on the contractor were carried out; I had no jurisdiction with respect to operations. (Tp. 430) "I did arrange to send a man down there for a few days in September in connection with other work which he was going to Batesville, and his report was submitted within a week or ten days, and we sent another man down in November; neither one of them was to stay full time. (Tp. 431) Paragraph 5 (c) of mortgage is read, with following questions and answers:

"Q. Now, my question is this, did you, as a Government representative, feel that you had no obligation at all to see that those funds advanced by the Government were used to pay creditors?

"A. No, sir.

"Q. All right, you felt entirely free of any obligation to pursue the inquiry as to whether or not Westmoreland spent the money wisely or foolishly?

"A. We had no obligation to Westmoreland to do that Sir.

"Q. My question was not that; my question was did you feel any obligation to the creditors?

"A. No, sir.

"Q. And I presume if you felt any obligation you did nothing in any way at any time that would protect these [fol. 6] materialmen or suppliers, is that correct

"A. I am unable to say what could have done." (Tp. 432)

I was at the plant site Feb. 9th and 10th, 1953, and recall seeing steel there, but don't know whether I inquired specificially if it had been paid for.

"Q. Now, it developed that there was an over-run of approximately half a million dollars at the time you were there in February, 1953?

"A. Yes, sir.

"Q. Now, had you made any investigation at all to determine when that over-run occurred?

"A. It was an accumulative over-r..., of course.

"Q. Over how many months?

"A. I don't know, I have no way of knowing.

"Q. If there had been one or more Government representatives on the job from April 7, 1952, up until the time that you were there and if they had an opportunity to see the boo'ks of the company would it not be that the present deplorable situation (Tp. 433) in which the creditors have not received payment would not have occurred?

"A. I can't answer that, Sir.

"Q. You mean that a man on the job with access to the books could not determine whether or not these people were being paid?

"A. You could determine whether or not they were being paid, but we had no jurisdiction with respect to paying them.

"Q. Would you have expected him to report that to you?

"A. Yes, sir.

"Q. What would you have done?

"A. Called the people on the "carpet."

"Q. Called Westmoreland?

"A. Yes, sir.

"Q. Would have made further advances having knowledge of that?

"A. I can't answer that.

"Q. Did you make or approve an advance of three hundred thousand dollars in February, 1953 after you had knowledge of that?

"A. No, sir, it was approved in January.

[fol. 7] "Q. It was approved in January, but it was not paid until February, is that correct?

"A. That is correct.

"Q. After your visit there?

"A. No sir; I think it was paid during my visit there to be [presise]. (Tp. 434)

"Q. Oh, it was paid while you were on the grounds?

"A. Yes, sir.

"Q. Now, the mortgage provides "That you", Westmoreland, "shall furnish the Government with unencumbered and unqualified mortgages covering new facilities

and all mining properties presently owned by you"; whose responsibility was it to give to the local department of GSA the list of the new equipment that was acquired by Westmoreland?

"A. As I recall, the legal division obtained it themselves, but I am not sure.

"Q. Did you say that it was not any responsibility of the division in which you operated.

"A. That is right.

"Q. How, then, did you expect the legal department to acquire this information, and from whom?

"A. I would expect them to acquire it from the contractor. (Tp 435)

I don't think I have ever read the supplemental mortgage and do not know the terms of it. I did not think it essential for me to acquaint myself with the terms of it. (Tp. 438) The Government had no representative in Batesville with [whome] creditors could consult. He could go to the Administrator of D.M.P.A. and [thought] him find the proper party to answer the question. (Tp. 439) Mr. Ford, as Director of the Contract Division was responsible for administration of the Westmoreland contract, and I was his deputy. Within a few days after the execution of the Westmoreland contract in a GSA conference responsible for negotiation of the contract I wrote a memorandum containing the following language: The low estimation in [fol. 8] which the contractor was held by those that participated in the contract negotiations was succinctly expressed by one of them three days after the contract was signed, as follows: "We have progressed from an instinctive "there is something wrong here at the start of negotiations but have considered that the whole outfit will bear watching since of necessity there will be many opportunities to increase costs and decrease recovery at the proper times to affect price adjustment in what is practically a guaranteed profit contract." (Tp. pp. 440-442, Incl.) Notwithstanding all the matters that appear in this report, a further advance of over three hundred and forty-four thousand dollars was made February 12, 1953, to Westmoreland. (Tp. 442) I have already stated that had I known all the facts I would have acted differently, and if a representative had been there on the job I would have had

a substantially better opportunity to know the facts. Westmoreland had no control of any kind as to whether the Government had a [represenative] on the job (Tp 443): that was a decision solely and only of the Government. As to standard procedure on a three million dollar contract as to allowing passage of six months without having a Government man on the job to view progress, that is a decision for the Government to make, and there is no such thing as standard procedure. (Tp. 444) If it exists, it was not followed in this case. I did not approve or reject employment of the engineers and made no objection to their payment. (Tp. 445). I do not know under what appropriation of Congress DMPA acquired funds to be used in the mortgage advance. (Tp. 446.) I have no knowledge of paragraph 4 of the supplemental mortgage. (Tp. 448) I was administering the contract.

"Q. I understand you were administering the contract, but I I am asking is if you took any steps of any kind to see if Westmoreland complied with its provision of the contract; if you did, is it a yes or no answer.

"A. It took several steps, I was not successful.

"Q. All right, will you name those steps.

"A. Well, we required—let's go back a bit—we re- [fol. 9] quired a competent manager, we had the general belief that the company would complay with their tacit agreement to that effect, we had no reason to believe to the contrary, we received from them certifications at intervals which are called cash flow sheets, which stated uniformly the plant would be completed within the funds available and that in itself is a very good indication that the contractor is carrying on his work in accordance with the plans; we had perhaps occasion after a while to doubt the situation to the point that we checked into it, but we did have a contract with the company and they were obligated thereunder to produce certain things, the fact that we didn't catch them in the act soon enough is unfortunate, is all."

"Q. But you did catch them in the act to your knowledge as early as October, 1952, did you not, Sir?

"A. We had suspicions which we had to verify and carry on and (Tp. 449) we were as anxious as anybody would be to see the thing succeed, we didn't know in October and we had the assurance of the General Manager that the

Plant, at least the mill and so on would be completed one hundred thousand dollars below the estimation which was good enough, he knew better than we.

"Q. The point is that you were relying entirely on the assurance made to you by Westmoreland, but without any independent supervision or audit or check?

"A. That is right.

"Q. And that was your responsibility in administering, in making a policy decision as to what supervision or control was necessary?

"A. That was decided by the DMPA not to put a permanent man down there, as you know, by my superior.

"Q. The Government is made up of men and I am trying to put the responsibility somewhere and if that was not your responsibility I certainly do not want to place that responsibility on you.

"A. All right, it was taken away from me in that particular case.

[fol. 10] "Q. All right, on whom did it rest?

"A. Mr. Howard Young refused to let us send a man down there, he was deputy commissioner.

"Q. And you regard that as the crux of the whole issue so far as supervision is concerned. (Tp. 450)

A. Well, I take orders, Sir."

Mr. Howard Young, as the responsible officer in the agency, never issued any directive of any kind that [would] have stopped me from seeing that creditors were paid. (Tp. 451)

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"The responsibility for the administration of contracts negotiated by the Contracts Negotiation Division was delegated to that Division; the amount of supervision which was exercised with respect to individual contracts depended on the importance of the contract, the amount of money that the government had in the contract and other matters; I functioned purely ministerially in carrying out the administration of that contract, which was basically the problem of seeing that both the government and the contractor carried out their obligations under the contract; that respect to fiscal matters, that was handled by the fiscal people; with respect to legal matters, it was handled by the legal people." The Court: "Mr. Highsmith brought up a ques-

tion that has been in my mind since the beginning of the trial of this case, and sooner (Tr. p. 164) than it did."

The Witness "It is a complicated problem and we had a number of them at that time, but with respect to management I have testified to it as covered in the record that we required the contractor to provide competent management . . ."

The Court * * * would it not appear the government would have somebody on the ground or somebody whose duty it was to determine whether or not the contract was being fulfilled instead of waiting for months and months and then finding it out; as it appears you didn't find it out that the condition was such as it was until months and months after the work had (Tr. p. 165) begun. Now, that is something the Court is interested in knowing.

[fol. 11] Mr. Eisele: "There is furthermore a provision of the contract which says the Government did have the right to maintain one or more representatives at the site for access to the books and records of the corporation at all reasonable times, audit said books and records and observe the operation of the corporation, that was a contractural provisions."

"Q. Now, in a way I think the Court has asked you why you didn't utilize the rights under the paragraph."

The Witness: "On the day after the contract was signed Mr. Ford was here and requested the authority from the Deputy Administrator to place an auditory and an engineering representative at the site of the work to do exactly as you have pointed out, but Mr. Young refused, the man in charge refused to permit it." (Tr. p. 166)

Mr. Young was Deputy Administrator of DMPA, that was the basic control; and it was not until August or September that I found a way to get a man down here; I don't pass the blame, but that is the facts;" (Tr. p. 167)

[fol. 12] Government's Trial Exhibit #11.

This is a memorandum of Mr. John G. Ford, Director of the Contract Negotiations Divisions of DMPA, to Mr. Howard I. Young, Deputy Administrator of DMPA, dated April 10, 1952, discussing the Government's contract with Westmoreland Manganese Corporation of April 7, 1952, and which contains the following:

"The net result has been that we have progressed from an instinctive "there's something wrong here" at the start of negotiations to a considered opinion that the whole outfit will bear watching, since of necessity there are to be many opportunities to increase costs and decrease recovery at the proper time to affect price adjustments in what is, practically, a guaranteed profit contract."

"We concur in your viewpoint that in general it is inadvisable to maintain a continuous watch over our contractors. In this case we strongly recommend that a technically qualified [represenative] and a competent auditor be assigned full time to the project from the start of construction until we are certain that everything is operating satisfactorily, such representatives to keep their eyes and ears open and their mouths shut and to report direct to Washington. We do not question the business ability of the Company officials, but rather the way in which such ability will be applied. We believe that competent management can be secured. We are not convinced that it will be."

[fol. 13] Clarence J. Koontz, witness for United States, testified:

I am an attorney for General Services Administration; have been an attorney since 1933 and with the Government since 1934; have held my present position since March 5, 1952. I had nothing to do with preparation of original letter contract (Tp. 745). I examined the contract the day it was signed. I was assigned the job of preparing the mortgage, but counsel for Westmoreland offered to prepare the initial draft, which, after conferences was modified as satisfactory to both parties (Tp. 746-747). On my recommendation the Government employed Mr. Harry Meeks of Little

Rock and papers were forwarded to him for closing. He advised a supplemental mortgage which we authorized and which he prepared (Tp. 748). Upon closing Mr. Meeks issued his opinion, stating that in his opinion the Government had a good and first mortgage lien on the assets of the company and had safe-guarded the interest of the Government in every respect (Tp. 748)

On cross-examination by attorney for creditors Mr Koontz further testified:

I did not prepare the contract of April 7, 1952. Preparation of original note and original mortgage was under my supervision (Tp. 833). Copy of the contract and all pertinent papers and information about the case were forwarded to Mr. Meek. I don't recall just what Mr. Meek said in his opinion and do not have a copy with me (Tp. 834). When the supplemental mortgage was completed Mr. Meeks proceeded with the execution, the recordation of the mortgage and final closing and then forwarded the papers to Washington with his opinion on the title (Tp. 835 6). No Arkansas attorney was consulted regarding Amendment No. 1. It was my intention in preparing Amendment No. 1 to relieve the Government from giving the 60 days notice in event of default after Amendment No. 1 (Tp. 837). Neither my office nor anyone acting under advice from my office took any steps to comply with Mr. Meek's letter of June 19, 1952 (Tp. 843-844).

[fol. 14] Trial Exhibit #22.

Letter From Harry E. Meek

Dated June 19, 1952

Little Rock, Arkansas.

"Mr. Albert H. Green,
General Counsel,
Defense Materials Procurement Agency,
Washington, D. C."

. . . . . .

"With reference to liens which may hereafter result from the construction of the plant, please note the following: Under our Arkansas Statute where a mortgage is given to

secure a loan to finance the construction of an improvement, the mortgage takes priority over any statutory liens created in connection with the construction of such improvement. See Sebastian Bldg. & Loan Assn vs. Minten, 181 Ark. 700; 27 S.W.2nd 1011. However, in a situation of this kind I have always been afraid to rely 100% on this statute. It could be argued that this statute applies only when the proceeds of the loan are disbursed in one lump sum before construction commences, and does not apply to a situation where the mortgage proceeds are advanced from time to time as construction progresses. Therefore, I think that it would be advisable if, in connection with each future disbursement, some precaution be taken by the government to protect itself against currently accruing construction liens. Most certainly the Government's mortgage might fail as against removable installations of machinery which had been purchased under conditional sales contracts."

[fol. 15] Mr. Patten (Atty. for Govt)

"Your Honor, at this time I think we might clarify the situation; the Latrobe Construction Company, the United States and Westmoreland have entered into a stipulation reducing the Westmoreland claim (should be Latrobe claim) from $314,471.33 to $137,580.00 based upon a Government audit of their cost, plus the usual percentage of overhead and profit, it is really on cost plus and the Government satisfied itself with cost; that stipulation is (Tr. p. 178) only as to the amount, and it does not involve priorities, of course." * * * "They are in the same position now as the other creditors, Your Honor, as far as the dispute is concerned."

The Court: "Now, here is what I am getting at, Gentlemen: I think my ruling will be that any creditor who holds a miner's lien on property which is subject to be removed from the realty, I mean physically subject to being removed, has a lien prior to the Government's mortgage on that particular property; they have a lien on the land, but it would be subject to the Government's lien on the land, the Government's mortgage on the land, but where material-

men or laborers furnished material which comes within the purview of the Miners' Lien Statute, [which] has not been paid for that [meterial], he can seize it and he can remove it from the land, if it is subject to removal, just like a house that might be put on rollers and rolled off the land, and his lien would be prior to the Government's mortgage on personal property, don't you see, [sp] that now is . . . (Tr. p. 180)

Mr. Patten: "Your Honor, with regard to the stipulation, of course, our general contention is they do not have a Miner's Lien superior to ours, but so far as this particular claim is concerned, this stipulation puts Latrobe exactly in the same class and position as the rest of the Lien Claimants in that if they are going to establish a Miner's Lien [fol. 16] they must establish all of the features . . . I mean, Sir, they must establish all of the factors that go to constitute a Miner's Lien. Now, we have admitted the amount." • • • "We don't admit they have a Miner's Lien; we admit that they have filed their proceeding under such and such a Statute; now, then, we don't want to admit as a matter of law that they have a Miner's Lien."

"Mr. McCaleb: (Atty. for Latrone) Do you intend to put them in the same category as the other lien claimants?"

"Mr. Patten: Yes, sir." (Tr. p. 182)

[fol. 17] W. S. STRINGHAM, a witness for Westmoreland, testified:

Details [principals] upon which gravity recovery plants operate. (Tp. 1221 to 1222, Incl.) Further discusses process with the Court. (Tp. 1224 to 1227, Incl.) There was no basic change in the Westmoreland plant. Reads from Wroth report as follows:

"The flow sheet of the mill now in course of construction calls for a crusher followed by a series of log washers and screens. The crusher will be set at 4 inches (Tp. P. 1238) and all the minus 4 inch plus $\frac{1}{4}$ inch material will be washed clear of clay and will be sent to heavy media separation. The minus $\frac{1}{4}$ inch material will be screened to reject all

material finer than 35 mesh and the minus-$\frac{1}{4}$ inch plus 35 mesh material will be treated in the Dutch Cyclone. This is, in essence, a gravity separation process although employing the most modern treatment." (Tp. p. 1339)

This witness gave a detailed statement, and made detailed references to a map of Westmoreland mining lands, pointing out to the Court the area where drilling had been done and the stripping preparatory to mining and the location of Westmoreland valuable ore bodies in Independence County. (Tp p. 1359) Also details to the Court and points out on map the drill holes on Westmoreland properties as of March 15, 1952 and as revised to June 1, 1953. (Tp. p. 1360) Points out location where Westmoreland contemplated doing first mining; where drilling was done from November to March 1953; gives names of the different mines involved and what work had been done around the various mines. (Tp. pp 1361 to 1369, Incl.)

[fol. 18] GEORGE MORRISON, a witness on behalf of Bragg's Electric Construction Company, testified as follows:

That he is employed by Bragg's Electric Construction Co. as Secretary-Treasurer and has been with Bragg's for twelve years. That he has a degree in electrical engineering from the University of Minnesota. That he first heard of the Westmoreland Cushman Plant Construction through one of the salesmen for one of the local wholesale houses who travels the state and when he heard of it, he contacted Mr. Holloway of Westmorelands. (Tr. 1543) That he subsequently received a request to bid on the electrical work at the Cushman Plant from the Engineers in Birmingham, which request was accompanied by the customary plans and specifications. Understands that Fagan Electric Co. also bid on it and some electrical or construction company in Birmingham and some others. That he, the witness, prepared the bid for Bragg Electric. This bid was prepared from a careful analysis of the materials and quantities and estimated labor necessary to install the equipment. (Tr. 1544) Followed the normal procedure in preparing the estimate and bid the job just like any other job. After our bid was submitted, I saw Mr. Holloway, who was Vice-Presi-

dent of Westmoreland at that time and he said our bid was 10% low. (Tr. 1545) On October 8th we received a notice that we had been awarded the job. This was in the form of a letter from Mr. O. E. Sellars, President of Westmoreland. We then did a little checking into the situation to see about the Westmoreland corporation and found there was a substantial sum of money being put into the pot by the Government and some small portion of the money by private capital, which totaled, I believe, some four and a half million dollars and with that as a background, we believed there [fol. 19] was evidence enough of good faith to assure payment of our contract. Then we checked with you (Mr. Henderson, Attorney for Bragg who was conducting the examination of Mr. Morrison) and asked you to find out about it. (Tr. 1546) The first contract submitted to us contained information in regard to the financing of the project. This information in the preliminary contract submitted to us by Westmoreland was as follows:

"Whereas, the Owner is under contract dated April 11, 1952, with the United States of America, acting through the Defense Materials Procurement Agency, to deliver 264,000 long dry tons of manganese ore, such production to commence not later than April 7, 1954, the ore to be processed through a washing and concentrating plant; and,

"Whereas, under said contract the Government has agreed to advance the necessary funds to establish and construct, among other things, a washing and concentrating plant for the processing of said manganese ore. * * *"

We asked you, Mr. Henderson, as our attorney, to check with Mr. Highsmith the recitals in that contract and you subsequently advised us you had talked with Mr. Highsmith; that there had been worked out a system of countersignature on Government checks and we would be paid direct, and we took all of that into consideration before signing the contract. It is accepted practice in Arkansas, established in the trade, to furnish labor and materials to owners who do not have their own capital but rely upon advance of funds by a lending institution. I would say ninety per cent of the contracts in this state are handled in that manner and it is not at all an unusual thing. It is customary

also to make inquiry of the lending institutions and verify the facts and we did so in this case. I personally supervised the work at Westmorelands. (Tr. 1548) Made no inquiry direct to Mr. Chapman before entering into and signing the contract. My information was that the Government was to advance $3,700,000.00 and Westmoreland was to put in $800,000.00, and I did verify the [existance] of the April 7th letter agreement. (Tr. 1549) I supervised the work personally, being there about two days each week from the time we started the work. I stayed personally on the job [fol. 20] because Mr. Holloway had told me we had bid too low. Our work was the complete electrical work of the plant and we started with the design and lay-out on the transformer on the sub-station adjoining the washing plant. From that point we built a pole line running down through the area past the heavy media and Dutch cyclone building, then to the cafe building and the pump house, where we placed the motors and made connection to the motors at the pumps. We installed heavy switch gear incidentally with the operation of the 2300 volt motors. (Tr. 1550) We actually installed the motors in the pump house. In the washer room we built a switchboard and fabricated a switch boom forty feet long and mounted such things as circuit breakers, capacitors, grids, drum controls, magnetic starters. From these pieces of electrical equipment we ran and installed conduit to the under washers, screen scalpers in the washer plant. All of the energy to be used in the plant was electrical energy. (Tr. 5051) Everything upon which we performed work can now be removed from the premises with the exception of a few conduits which were embedded in the slab of the washer plant. I personally prepared the exhibit of the Stipulation. It shows the various items Bragg performed work upon and furnished materials and Bragg actually did perform work on each of these items and each of them can now be removed. (Tr. 1552) Some of them have been removed by the Receiver. Some of the motors are now in the Multi-Quonset Building in dry storage. After undertaking performance of our contract, we were partially paid; we submitted estimates based on percentage of completion of component parts of the work. Our requests for monthly payments were submitted to the Resident Engineer on the job in Cushman at Batesville and they were passed to West-

moreland for payment. (Tr. 1553) The checks given us for payments were made out in Batesville and signed by an [fol. 21] officer of Westmoreland and then sent to the G.S.A. Office in Dallas where Mr. Chapman counter-signed them and returned them directly to Bragg's. I didn't personally talk to Mr. Chapman in Dallas, but you, Mr. Henderson, talked with him on two occasions when I was in your office. (Tr. 1554)

By The Court:

I believe Westmoreland stipulated those claims are just.

Mr. Goodwin, Attorney for Westmoreland:

He stipulated just that. (Tr. 1554)

On March 9th we submitted a progress statement in the amount of $7,637.72, which was allowed by the Engineers. Our lien in the amount of $15,700.13 includes $6,347.62 which represents 10% hold-back from the advancement by the Government of amounts known and admitted to be due to Bragg's. (T. 1555)

Cross-Examination.

I would say that everything we worked on, with the exception of the Multi-Quonset Building, where we had some conduit, much like wiring in a house in plaster, would be removable.

Redirect Examination.

Except in the Multi-Quonset Building, everything is run exposed and I will say that except for the conduit embedded in the washer plant, the concrete floor, everything else is removable.

Recross-Examination.

We actually moved some of the motors in the pump house —set them in place. We set these motors on the pump bases. Trued up shafts, put the belt on. (Tr. 1557)

It was agreed that Mr. Henderson, Attorney for Bragg's Electric Construction Company, if called as a witness,

would testify: "On February 18th he called Mr. Chapman in his office in Dallas, as he was principally concerned with actually getting a counter-signature upon a check for some $20,000.00 and also discussed with Mr. Chapman the method [fol. 22] whereby they would receive future checks and that Mr. Henderson's testimony would in no way be contradictory to the testimony Mr. Chapman gave on his examination, but supplementing such testimony of Mr. Chapman Henderson would testify that he advised that extras under the contract would be paid in exactly the same manner, and, after a brief interval when he left the telephone and checked figures, he advised him that 'we need have no concern about extras, so long as they did not exceed $10,000.00. That Mr. Henderson called Chapman again in Dallas on March 7th to discuss rumors in reference to the job being about to fold up, and he asked Mr. Chapman if he knew anything about it and he said he did not. He told Mr. Chapman they didn't want to continue the work up there unless they were going to get paid for it, and he stated in reply he had no knowledge whatever about any shut down or prospective shut down, and after our approved invoices were received, we would promptly get our money. Thereafter, on the basis of that information Mr. Henderson advised Mr. Morrison of Bragg's to continue to fulfill his contractual obligation." (Tr. 1560-61)

[fol. 23] R. M. Knox, a witness on behalf of Crow-Burlingame Company, a lien creditor, testified as follows:

He is credit manager for Crow-Burlingame Company and has been such for twenty-five years and was called on to approve Westmoreland for sales on credit (tr. 1564) when orders from Westmoreland were submitted; this was August 26, 1952. He investigated through Dun & Bradstreet and then followed this up by personal call to Mr. R. B. Chapman, Regional Disbursing Officer of G.S.A. at Dallas (tr. 1565).

On August 26, 1952, he called Chapman and told him that they wanted to sell Westmoreland but were not able to get much information; that Chapman was rather evasive but did say that Westmoreland was building a plant and the

Government was furnishing the money and that "disbursement would be made through the Dallas office, and that we had no reason to worry about our money" (1566-7). On that statement of Mr. Chapman, he approved Westmoreland for credit and invoices as the account progressed from August 26, 1952 were forwarded to Dallas and checks were issued over Mr. Chapman's signature and the signature of one of Westmoreland's officers.

In the beginning the account was prompt and then it began to get a few days late and "at the last we just didn't get any money at all" (tr. 1567).

He talked to Mr. Chapman again when the checks were late and Chapman said that part of the invoices had been approved and checks would be sent and the checks were sent and received by Crow-Burlingame Company (tr. 1568)

On February 25, 1953 he called Mr. Chapman about the amount then owing Crow-Burlingame in the sum of $3,918.05 and Chapman said the invoices were being processed and as far as he knew they were all right and Crow-Burlingame would be getting a check. We never got those checks and that amount together with some other little additional items constitutes Crow-Burlingame's present account and lien claim.

Later, Knox testified, that he had a Crow-Burlingame representative check the Crow-Burlingame merchandise in Westmoreland's warehouse at Batesville for the purpose of [fol. 24] taking it back for credit, but between the time the check was made and the time when they sent a representative up to get it, a Government representative had come into the plant and would not let Crow-Burlingame have it. (tr. 1571) The prices charged by Crow-Burlingame were catalogue prices set up by the manufacturer with some times a discount of 5% to 10% on [quanity] purchases.

Cross-Examination.

On cross-examination Mr. Knox testified that his investigation disclosed that the Government was advancing funds to Westmoreland under a loan.

Q. You knew all the time Westmoreland Manganese Corporation was building that plant out there and not the Government?

A. They were building it under the supervision of the Government.

Q. Well, you don't know that as a fact, do you?

A. That is the information I received through Mr. R. B. Chapman and other channels.

Q. You previously told us about Mr. Chapman; do you claim that it was under the supervision of the Government?

A. That is right.

Q. Do you know how Mr. Chapman knew?

A. No, Sir.

Q. That the Government was supervising construction up there? A. That is right.

Q. What telephone conversation was this?

A. The one on August 26th.

Q. The first one? A. 1952, that is right.

All of the purchase orders were from Westmoreland. (tr. 1578)

[fol. 25] E. H. Moore, a witness on behalf of creditors, testified as follows:

He was work's accountant and finally chief accountant for Westmoreland Manganese Corporation. This witness testified as to the flow sheets and the various amounts set up and agreed upon for construction and working capital, land acquisition, etc. and then further testified that on April 3, 1953 there was on deposit in the bank at Batesville in Special Account No. 1, $119,230.31 and that this was recouped by the Government. This money was part of the advances made by the Government against the requirements shown in the flow sheets and it was to be used for the purpose of paying for commitments and purchases made by Westmoreland for completion of its contract for the erection of the plant and for items required to be purchased under the said flow sheets (tr. 1594)

(The Government did not cross-examine witness, counsel for Government saying "we doubt if we will put on any evidence to the contrary". (tr. 1595)).

[fol. 26] Conclusions Of Law Requested By The United States Of America:

This Court has jurisdiction of the subject matter involved and the parties to this action.

The original Letter Contract No. GS-OOP(D)-12263, executed on April 7, 1952, and more particularly described in the Findings of Fact and introduced into evidence, is a valid contract based upon a valid consideration and by reason of the said agreement, the parties became bound to perform according to the terms thereof.

The mortgage note in the principal sum of $3,807,250.00, executed and delivered by Westmoreland Manganese Corporation to the plaintiff on May 22, 1952, was executed pursuant to the original Letter Contract and for a good and sufficient consideration and is a valid and binding obligation.

The Real Estate and Chattel Mortgage and the Supplemental Mortgage, executed and delivered by the defendant, Westmoreland Manganese Corporation, to the plaintiff on May 22, 1952, and referred to in the Findings of Fact and introduced into evidence, were executed pursuant to the original Letter Contract for good and sufficient consideration and are valid and binding obligations.

The Real Estate and Chattel Mortgage and the Supplemental Mortgage in favor of the plaintiff constitute a first lien upon all of the property described by these instruments and constitute security for all the advances made by the plaintiff. Those instruments constitute a first lien upon all property acquired by the defendant, Westmoreland Manganese Corporation, after the execution and recordation of said mortgages. Said mortgages constitute a lien in favor of the plaintiff, which is first, prior, paramount, and superior to the liens and interest of all other parties to this action, upon all of the property of the defendant, Westmoreland Manganese Corporation, real, personal, and mixed, including but not limited to cash, choses in action, causes of action, claims, debts, and obligations, whether liquidated or not; and all property and interests in property belonging to said defendant, Westmoreland Manganese Corporation, whether now reduced to possession or not.

The contract entitled "Amendment No. 1" executed by the parties on April 2, 1953, and introduced into evidence is a valid and binding agreement based upon a good and sufficient consideration and created the rights and obligations therein set forth.

Under said Amendment No. 1, executed on April 2, 1953, the plaintiff was given the unqualified right and privilege of terminating the contract at any time up to the commencement of production upon a determination by it that said determination was in its best interest.

By giving notice of termination of the contract under Amendment No. 1, the indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to the plaintiff was accelerated, and said advances became immediately due and payable, and the said mortgages became subject to foreclosure.

Under the provisions of Amendment No. 1, dated April 2, 1953, the government was given the unqualified right to terminate the contract without thereby being liable in any way for any damages to the defendant, Westmoreland Manganese Corporation.

The government never defaulted or breached any obligation which it had under the original letter contract with the defendant, Westmoreland Manganese Corporation, or under the Mortgage Note or Real Estate and Chattel Mortgage or Supplemental Mortgage or Amendment No. 1 to the Contract.

Although demand was made upon the defendant, Westmoreland Manganese Corporation, it has failed to repay any of the advances made by the plaintiff under the agreements and that the defendant, therefore, is indebted to the United States in the principal sum of $2,877,096.50 and accrued interest of $159,639.19 as of January 8, 1954. Interest accrues on the principal balance at the rate of $315.288 per day.

That the plaintiff is entitled to judgment as prayed in its complaint in the amount of $ ....., which includes principal in the amount of $2,877,096.50, interest as of Jan

uary 8, 1954 in the amount of $159,639.19, and interest thereafter at the daily rate of $315.288 until the date. Plaintiff is entitled to interest on said judgment, after the date of said judgment, at the rate of Six Per Cent (6%) per annum until paid.

If the said judgment is not paid within a reasonable time, as set out therein, plaintiff will be entitled to have all of the properties of the defendant, Westmoreland Manganese [fol. 28] Corporation, sold by a Commissioner appointed by this Court for that purpose.

Amendment No. 1 to the original letter contract contemplated that the government would advance funds to Westmoreland Manganese Corporation in amounts different from, and for purposes other than, those contemplated under the original letter contract. The plaintiff under said agreement obligated itself to do certain things which it was not obligated to do under the original Letter Contract GS-OOP(D)-12263.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 516

LATROBE CONSTRUCTION COMPANY,
BRAGG'S ELECTRIC CONSTRUCTION COMPANY,
ARKANSAS FOUNDRY COMPANY,
GENERAL STEEL PRODUCTS COMPANY,
JEFFERY LUMBER COMPANY,
PADGETT LUMBER COMPANY,
CHOCTAW, INC.,
IRA SHERRILL,
MILL AND MINE SUPPLY COMPANY,
CROW-BURLINGAME COMPANY ..... *Petitioners*

v.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A. L. BARBER
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Little Rock, Ark.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. .....

LATROBE CONSTRUCTION COMPANY,
BRAGG'S ELECTRIC CONSTRUCTION COMPANY,
ARKANSAS FOUNDRY COMPANY,
GENERAL STEEL PRODUCTS COMPANY,
JEFFERY LUMBER COMPANY,
PADGETT LUMBER COMPANY,
CHOCTAW, INC.,
IRA SHERRILL,
MILL AND MINE SUPPLY COMPANY,
CROW-BURLINGAME COMPANY — *Petitioners*

v.

UNITED STATES OF AMERICA — *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Latrobe Construction Company, Bragg's Electric Construction Company, Arkansas Foundry Company, General Steel Products Company, Jeffery Lumber Company, Padgett Lumber Company, Choctaw, Inc., Ira Sherill, Mill and Mine Supply Company and Crow-Burlingame Company, pray that a writ of certiorari be issued

to review the Final Judgment of the Court of Appeals for the Eighth Circuit entered on the 26th day of June, 1957, in the case of *United States of America* v. *Latrobe Construction Co., et al*, No. 15547 on the docket of that Court.

OPINION BELOW

The Opinion of the United States District Court for the Eastern District of Arkansas is reported in 134 Fed. Sup. 898 to 950 (R.172-231). The Opinion of the Court of Appeals for the Eighth Circuit (Appendix A, infra, pages A-2 to A-17) is reported at ..... Fed. (2) .....

JURISDICTION

The Judgment of the Court of Appeals was entered on June 26, 1957 (App. A-17) and Motion for Rehearing was denied on August 7, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

The Court of Appeals reversed the holding of the District Court that the Petitioners herein were entitled to priority in a mortgage foreclosure action brought by the Government. The trial court ruled that the Petitioners' mining lien claims established under the laws of Arkansas were superior to the claims of the Government claiming under an after-acquired property clause in its mortgage (R.214-218). The Court of Appeals held that the Government had secured a "contractual" lien by virtue of its letter contract with the mortgagor and that under Federal law the "contractual" lien was superior to the statutory liens of the Petitioners under Arkansas law (App. A-1 to A-16). Thus the following questions are presented to this Court:

(1) Does the Defense Production Act of 1950, Act September 8, 1950, C 932, 64 Stat. 798, as amended, authorize a contracting officer of the Government

to create a "contractual" lien that is superior to a state statutory lien of mining lien claimants who were not parties to the contract between the Government and the party for whom the mining lien claimants furnished materials and labor?

(2) In the event that an affirmative answer is given to point (1), does the letter contract between Westmoreland Manganese Corporation and the Government clearly show that the lien of the Government was to be superior to the statutory lien of the contractors for labor and material?

(3) In the event that points (1) and (2) are both answered in the affirmative, then the question is whether or not the Government may prevail under an after-acquired property clause in its mortgage over the statutory miners' liens of the contractors when the mortgagor's title or improvements are created by the material sold or labor performed by the mining lien claimants?

(4) It being clear that under Arkansas Statutory Law and the decisions construing that law, the claimants' miners liens are superior to the Government's mortgage lien the question is presented, as to whether or not the Government in its contracts with its citizens is bound by the terms of § 1652 Title 28, U.S.C.A.?

STATUTES INVOLVED

The pertinent provisions of the Defense Production Act of 1950, Act September 8, 1950, c932, 64 Stat. 798, are as follows:

Sections 2062, 2092, 2093 of Title 50, United States Code Annotated, War and National Defense — Appendix B-1 to B-4.

Arkansas Miners' Lien Statute (5 Ark. Stat. 1947)—

Sections 51-701—51-704 Appendix B-4 and B-5.

United States Code Annotated, Title p. 28, Section 1652, B-6.

STATEMENT

On April 7, 1952, the United States, acting through the Defense Procurement Agency, addressed a letter to the Westmoreland Manganese Corporation, Batesville, Arkansas, in which it proposed to enter into a contract with Westmoreland "which will provide for production" of 264,000 tons of manganese, production to begin not later than 12 months from the date of your acceptance of this order (R.22-35).

This "order" was accepted by Westmoreland on April 7, 1952, and became the basic contract between the Defense Procurement Agency and Westmoreland. The contract provides that

> (d) For the purpose of assisting Westmoreland in the performance of its obligations under the contract, the government agreed to advance to Westmoreland on its written request from time to time as needed by Westmoreland for
>
> > "developing, equipping, preparation and operation of the aforesaid facilities, including working capital, completion of land purchase, and the acquisition and installation of new facilities, for the mining, production and processing of the ore called for hereunder" (R.23).
>
> sums of money up to a total of $3,807,250.00. Of this amount up to $2,788,650.00 was to be used for acquisition and completion of new facilities; $418,600.00 to pay off the balance owed on mining properties; and $600,000.00 for working capital.

This basic contract, prepared by the Defense Production Agency, further required Westmoreland to put its plant in condition to produce the manganese, and to contract for and make commitments for such supplies and

services as might be necessary therefor. That provision of the contractor is as follows:

> "Upon your acceptance of this order you will proceed without delay with the development, equipment and preparation of the above-named property for the production of manganese ore at the rate required to meet your obligations hereunder, including but not restricted to the installation of a washing and concentrating plant of 6000 long tons per day capacity, *the construction of necessary roads, the procurement* of required mining and hauling equipment, and necessary related facilities for the production and processing of manganese ore, *and you will make such contracts and commitments for supplies and services as are necessary therefor*" (R.23) (emphasis supplied).

The contract further provided that the Government should have the right to have its representative at the work site and to have access to the books and records of Westmoreland, to audit same, and to observe all its operatives.

The contract provided that Westmoreland

> "should furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you which will be fully paid for through the advance of funds by the Government as prescribed or approved by the Government" (R.30),

and that the Government should have a paramount lien upon the credit balance in the special account set up from advance payments made by the Government.

On May 22, 1952, Westmoreland executed a "Real Estate and Chattel Mortgage" to the United States of America upon all of its lands in Independence and Izard Counties, Arkansas, and upon the furniture, fixtures, machinery and equipment *as then owned*, and upon such furni-

ture, etc., "and all other personal property hereafter acquired". This mortgage was given to secure a note of Westmoreland to the Government of $3,807,250.00.

The mortgage provided that the mortgagor

> "will not create or permit to accrue any debt, lien or charge on said premises which would be prior to or on a parity with the lien of this mortgage; that the mortgagor will prevent any debt, lien or charge from affecting the rights of the mortgagee" (R.41-42).

The Mortgagor waived all the benefits of valuation, appraisement, homestead exemption, stay, redemption and moratorium laws of the State of Arkansas (R.45).

On the same date, May 22, 1952, a Supplemental Mortgage was executed by Westmoreland for the purpose of making more explicit the descriptions of the properties covered by the original mortgage. This supplemental mortgage described the lands as located in Independence and Izard Counties, Arkansas, and it included after-acquired personal property.

As to after-acquired property the Supplemental Mortgage provided that "to the end that such future acquisitions may be encumbered under instruments more specifically describing the same", the mortgagor would from time to time and as requested by the mortgagee execute aditional instruments on forms to be approved by the mortgagee, as might be necessary to encumber such additional acquisitions under more specific description (R.50).

Section IV of the Supplemental Mortgage is as follows:

> "It being understood that the cost of constructing the proposed manganese washing and concentrating plant (to be erected as provided in Paragraph (B) of Subdivision I aforesaid) is to be paid out of the

proceeds of the advances to be made by Mortgagee to Mortgagor as hereinabove set out, it is understood (and notice is hereby given) that the lien of the Mortgagee under said Real Estate and Chattel Mortgage and under this Supplemental Mortgage upon said manganese washing and concentrating plant (and the site thereof) will take priority over the lien of any mechanic, materialman or laborer or any other statuory lien" (R.51).

After the execution of the two mortgages the Government advanced moneys to Westmoreland and Westmoreland proceeded with building and equipping the mining plant on its propery in Independence County, Arkansas. The work progressed until the project was about ¾ completed, when, for reasons not material here, the Government refused to make further advances to Westmoreland. This was in the early part of 1953. Westmoreland then shut down mining operations and halted further work on the plant and other mining facilities. At the time the Government refused to make further advances to Westmoreland there was on deposit in the bank account from moneys advanced by the Government against commitments made by Westmoreland the sum of $119,000.00, which the Government quickly withdrew.

In compliance with the requirement made in the contract prepared by the Government, Westmoreland made "such contracts and commitments for supplies and services" as were necessary for building a beneficiation plant and equipping and preparing the property for the production of manganese. The contracts made by Westmoreland, under this requirement of the basic contract, with the Petitioners here, form the basis of their claims for supplies, equipment and services.

When Westmoreland shut down all of the Petitioners here filed their lien claims against Westmoreland property

pursuant to the provisions of Arkansas lien laws. No question is presented here as to the correctness of any of the claims and the amounts thereof, as neither the Government nor Westmoreland disputed the validity or amounts of the lien claims (R.251).

On January 8, 1954, the Government filed its action against Westmoreland to foreclose its mortgages in United States District Court by virtue of Section 1345, Title 28, U.S. Code, and see Sec. 2156 (b), Title 50, App., U.S. Code (R.1-55). The material lien claimants were made defendants. They answered to the Complaint setting up the amounts of their claims for material and services, the filing of their liens as required by the Materialmen's—Miners' Lien Laws of the State of Arkansas and asserted that under such laws their Miners' Liens were superior and paramount to and over the mortgage lien of the government (R.56-135).

The case in the District Court was tried and briefed by the Government on the premise that the issue as to priority of the respective liens of the Government and the creditor lien claimants was a matter of Arkansas statutory law, and governed and controlled by the decisions of the Arkansas Supreme Court (R.214). The District Court held that the law of Arkansas was the applicable law and held in favor of the lien creditors, decreeing that the statutory liens were superior to the mortgage liens. In the decree the trial Court found that there was a quantity of material furnished by the lien claimants which was in the warehouse unused and gave the lien claimants who furnished those materials a first lien on such material to the extent of their invoice value. Otherwise the liens were decreed against the buildings, plant, etc., for which the material and labor were supplied. The memorandum opinion of the District Court relative to priority of credi-

tors' claims is given at length at pages 172-231 of the Government's Record on Appeal to the Court of Appeals, and the decree of the trial Court is found at pages 213-246 of said Record.

The Government appealed and the Court of Appeals for the Eighth Circuit reversed, holding that the applicable law is the Federal Common Law and that under the Federal Law the Government's mortgage lien was the superior lien.

REASONS FOR GRANTING CERTIORARI

POINT I

This Court has not passed upon the Defense Production Act of 1950 or any similar Act of Congress under which a Federal Agency, although not given an express statutory lien, claims priority on the ground that a contracting officer is allowed to provide for a prior lien even as against third parties on the basis that the statute provides that loans may be made "on such terms and conditions as the President deems necessary."

The decision of the Court of Appeals holds in substance that although admittedly the Defense Production Act did not create a statutory lien, giving the Federal Agency priority, that it does authorize the contracting officer to contract that the Government mortgage will be superior to all other liens including statutory liens of third parties. This creates a situation whereby it is a better policy for the Government not to have an express statutory lien as the Government would be limited in the scope and application of the lien by the statute but a contracting officer is not subject to any such restrictions under the theory advanced by the Court of Appeals.

We have found no reported cases construing this provision of the Defense Production Act of 1950. We have found no executive orders or directions under this Act that authorized or directed the contracting officer to provide for a lien that is superior to the liens of third parties, who have not in any way contracted with the Government. The legislative history of Defense Production Act of 1950 is found on pages 3620 to 3659 of Vol. 2, U.S. Code Congressional Service for the 81st Congress, second session, 1950, and the legislative history for the amendments of 1951 to this Act are found on pages 1584 to 1675 of Vol. 2

of U.S. Code Congressional Service for 82nd Congress first session 1951, and there is no mention of any congressional policy or intent to create or authorize any lien that is superior to the valid liens of third parties.

It is important that this question be decided by this Court in view of the fact that the Court of Appeals decision will be accepted as authority that any government procurement officer has the power by contract to create a lien in favor of the Government and that the lien so created will be superior to a valid statutory lien of third parties. The Court of Appeals decision creates a situation whereby the Government will prevail over innocent third parties even though the third parties search the statutes to determine if an express statutory lien is created, and even though they search the Federal Register to determine if an executive order granting lien has been issued under the statute, and in both instances determine that no such authority has been given. The lien can be a secret lien as the federal government is not bound by state recording statutes. "From the view point as a legal precedent, the decision of the Court of Appeals constitutes a new and sweeping expansion of the Law of Contracts, for never before has it been held that a person who is not a party to a contract can be divested of statutory rights simply by a recital in the contract that such statutory rights shall not apply. Under this decision, all persons who supply labor or material to anyone who, in turn, has a contract with the Government must do so at their peril and at the risk that the Government contract will deny to them valuable rights given by State Law to enforce a lien upon the product of their labor or material. This issue is one that should be decided by this Court."

In the lower Court the Government admitted in its brief that the only case it knew of on this point was *Thomson Machine Works* v. *Lake Tahoe Marine Supply Co.*, 135

Fed. Supp. 913 (Northern District of California, 1955). This case does not reach the issue involved here as it is based upon a statute, 34 U.S.C.A., Par. 582, which statute was construed to create an express statutory lien and the issue was not between the mortgage and the construction lien claimants but involved the passing of title and also the Court expressly did not reach the point of the priority of liens under the progress payments clause of the contract.

We submit that no superior lien is authorized under this Act insofar as third parties are concerned and that when Congress intended for third parties to be given an inferior lien position it has created an express statutory lien in favor of the Government.

POINT II

Assuming that the Defense Production Act permitted a contractual lien to be contracted for by the Government, there is no convincing proof that the contract involved herein so provided. The contract involved herein is a letter written to Westmoreland Manganese Corporation by the Defense Materials Procurement Agency and accepted by Westmoreland's President and the pertinent provisions of the contract recognizing the possibility of claims superior to that of the Government are found in the Statement of the case.

There was a further recognition on the part of the Government and its Counsel that liens of construction claimants might well be superior to the lien of the Government. This is evidenced in a letter from Mr. Harry E. Meek, a special counsel for the Government, in his letter to the Defense Materials Procurement Agency under date of June 19, 1952. In closing his letter the following statement is found:

"Therefore, I think that it would be advisable if, in connection with each future disbursement, some precaution is taken by the Government to protect itself against currently accruing construction liens. Most certainly the Government's mortgage might fail as against removable installations of machinery which had been purchased under conditional sales contracts" (Supp. R.11).

The leading case on the question of whether or not there has been a recognition on the part of the Government of liens that would be superior to the liens of the Government is *United States* v. *Ansonia Brass & Copper Co.*, 1910, 218 U.S. 452; 31 S. Ct. 49; 54 L. Ed. 1107. It is clear that the above mentioned sections of the contract and the mortgage and the statement of Government's own counsel show a clear recognition that there were possible lien claims of third parties and that these lien claimants might well be held to have had claims superior to the Government's. It is interesting to note that a specific lien was created upon the bank deposit but there was no specific provision in the contract that the mortgage was to be a specific lien over and above all other lien claims. Thus tested by the Ansonia decision, it is clear that the Government did not provide for a lien that would be superior to the lien of the Petitioners and the decision of the Court of Appeals is in conflict with the Ansonia case.

POINT III

The decision of the Court of Appeals is in direct conflict with the case of *Bear Lake & River Water Works & Irrigation Co.* v. *Garland*, 164 U.S. 1; 17 S. Ct. 17; 41 L. Ed. 327, as to the question of priority of lien between the mining lien claimants and the lien arising out of an after-acquired property clause in the mortgage. *Bear Lake & River Water Works & Irrigation Co.* v. *Garland*, *supra*, holds that a mortgage containing an after-acquired prop-

erty clause is not a valid encumbrance upon after-acquired property superior to that of a contractor's lien when the mortgagor's title is created by the contractor's labor and is acquired with the burden of the lien which attached simultaneously with the title to the mortgagor. The holding of the court below is in direct and complete conflict with the Bear Lake case. It is our position that where a mortgagee relies upon an after-acquired property clause in its mortgage that the mortgagee can never acquire title in a foreclosure suit that is superior to the title of the mortgagor and where the title to the mortgagor is burdened with the statutory lien at the time of the acquisition of the property, or at the time of the erection of the improvements, the holder of the statutory lien prevails under both Federal and Arkansas law.

The District Court followed the Bear Lake case and rejected all of the Government's contention and this problem was the only problem that the Government considered to be of serious consequence in the District Court in its final brief. The lower court's full discussion of the equitable issues involved is found on page 214 of the Record in this case.

The Court of Appeals did not discuss this issue but even assuming for the purpose of argument that the Defense Production Act of 1950 authorized a lien, or that a contractual lien was made, the issue still remains whether the lien would cover after-acquired property.

The Court of Appeals recognized that the District Court decision on Arkansas law was a permissible conclusion under Arkansas law. This is important in that it is indisputable that Arkansas law governed the title to Westmoreland's property, acquired by Westmoreland as a result of the improvements constructed or furnished by the lien claimants. It is clear that Westmoreland in its

dealings with these appellants was governed by Arkansas law and if this be true then the title which Westmoreland had to pass to the Government under the after-acquired title provision of the mortgage was strictly a matter of Arkansas law. The net result of the decision of the Court of Appeals was to give the Government a title that was free of a valid lien under Arkansas law and this decision should be presented to this Court for review, in view of the fact that for over 50 years the Bear Lake case has been the law of the land on the subject of priority of liens.

POINT IV

Certiorari should be granted because the decision of the Court of Appeals is in direct conflict with an Act of Congress, 28 U.S.C.A. 1652, regarding rules of decision as to applicability of the laws of the several states, and is also in conflict with the decisions of this Court.

In basing its decision upon Federal law and in holding Federal law as the applicable law in this case, the Court of Appeals evidently overlooked the provisions of Title 28 U.S.C.A. § 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

This section was orginally § 34 of the Judiciary Act of 1789 and has been in full force and effect ever since. The Act of Congress under which the Government contracted with Westmoreland, as has been shown, does not give the Government a lien of any kind, so we do not have an Act of Congress as over-riding the Arkansas Miners' lien law.

"In cases where they apply!"

The Courts of the United States have held many times that the title and disposition of property, personal and real, are governed by the *lex sitae*. The property involved in this case consisted of building material, electrical equipment and supplies "in place", and part in the warehouse in original *packages*. The material "in place" partakes of the nature of land or real property; that in the warehouse, personalty.

We refer the Court to some of these decisions:

In *First Savings Bank & Trust Co.*, v. *Stuppi*, 2 F. (2d) 822, the Circuit Court of Appeals, 8th Circuit, held:

> "In construction of mortgages the local state law governs."

In re Brose, 254 Fed. 664, the Court held:

> "The mortgage, the meaning of which is involved here, is a New York mortgage and if the New York Courts have determined its meaning this Court must give the same meaning to its words which would be given to them by the Courts of that state."

In the case of *City of Omaha* v. *Omaha Water Co.*, 192 Fed. 246-249, the Eighth Circuit Court of Appeals again held that:

> "The decisions of the Supreme Court of Nebraska concerning the nature and extent of the estate or rights of mortgagees in mortgaged property are controlling upon us."

In *Brine* v. *Hartford Fire Ins. Co.*, 96 U.S. 627; 24 L. Ed. 858, this Court held the following proposition to be sound:

> "And that all laws of a State existing at the time a mortgage or any other contract is made which affect the rights of the parties to the contract, *enter*

into and become a part of it and are obligatory on all courts which assume to give remedy on such contracts" (emphasis supplied).

Petitioners contend that the Arkansas Miners' lien law which gives the petitioners' liens superiority over the mortgage lien of the Government, under the doctrine approved by this Court in the Brine case, *supra*, and which law was in full force and effect at the time tl. Government took its mortgage as security for its loan to Westmoreland, the said Arkansas statutory lien law was written into and became a part of that mortgage.

The Arkansas law and the decisions of the Arkansas Supreme Court formed the applicable law and the judgment of the Court of Appeals should be reversed and the judgment of the District Court affirmed.

But the Government in this case may contend it is the "Government" and should not be held to the rules regulating transactions between individuals. This Court has held in numerous cases that when the Government conducts business affairs and enters into contracts with its citizens it is subject to and its rights are governed by the same laws as private individuals would be under the same circumstances. Cases so holding are:

The United States v. *The Bank of Metropolis*, 15 Pet. 377, 392; 10 L. Ed. 744.

Lynch v. *United States*, 292 U.S. 571; 78 L. Ed. 1434.

Pierce v. *The United States*, 7 Wall 666; 19 L. Ed. 169.

Headnote 1 to *United States* v. *Smoot*, 15 Wall 36, 21 L. Ed. 107, is as follows:

"This Court will not apply to contracts made by the Government, nor give to its action under such contracts, a construction and an effect different from those

which Courts of Justice apply to contracts between individuals."

In *Lynch* v. *United States, supra,* this Court said:

> "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

In this case we have never contended that the Government did not have a first lien on Westmoreland's interest in the property, but that Westmoreland's title to the property in question was burdened with petitioners' miners' liens from the moment the material was delivered to Westmoreland and that the Government by a contract with Westmoreland could not destroy those liens, or take the mortgaged property free of those liens.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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APPENDIX A

OPINION OF COURT OF APPEALS

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,547

United States of America,
Appellant,

v.

Latrobe Construction Company, Bragg's Electric Construction Company, Arkansas. Foundry Company, General Steel Products Company, Jeffery Lumber Company, Padgett Lumber Company, Choctaw, Inc., Ira Sherrill, Mill and Mine Supply Company and Crow-Burlingame Company,
Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas.

Decided June 26, 1957

Before WOODROUGH, VOGEL and VAN OOSTERHOUT, Circuit Judges

I. *Opinion of Court of Appeals*

VAN OOSTERHOUT, Circuit Judge.

In a mortgage foreclosure action brought by the United States against Westermoreland Manganese Corporation, hereinafter called Westermoreland, judgment was entered against Westmoreland in favor of the United States for $3,508,943.26, and sale of the mortgaged property was ordered. We have affirmed this judgment as to Westmoreland in an opinion filed this date. *Westmoreland Manganese Corporation* v. *United States*, 8 Cir., . . . F.2d. . . .

The trial court in a well prepared opinion, reported at 134 F. Supp. 898, 917, sets out in detail the facts pertinent to this appeal and his solution of the legal problems. We shall not encumber this opinion by setting out the complicated facts so well stated by the trial court.

The Government appeals from the court's determination that appellees,* who claimed miners' liens** under Arkansas mortgages as to such improvements erected upon the mortgaged property which had become appurtenant to the land. The Government also appeals from the court's determination that individual miners' lien claimants who had furnished identifiable particular items of personal property which had been delivered to Westmoreland but had not been incorporated into the improvements so as to become law for improvements erected upon the mortgaged premises subsequent to the date of the Government's mortgages, had liens prior to the lien of the Government, appurtenant to the land were entitled to priority with re-

* The creditor-defendants other than appellees either held judgments against Westmoreland or were unsecured creditors. Their claims were held to rank below the claims of both the Government and the appellees in all respects. Since the creditors other than the appellees have not prosecuted an appeal, their claims require no discussion or consideration.

** The miners' liens are claimed under Arkansas Statutes, Sec. 51-701 et seq. The applicable statutes are quoted in full in the trial court's opinion, 134 F.Supp. 898, 930-931.

spect to such property as against the Government's mortgage lien. The appellees were made parties below and had filed crossclaims.

Jurisdiction is established under 28 U.S.C., § 1345, and jurisdiction is also asserted under 50 U.S.C., Appendix, § 2156(b).

The court directed the manner of sale of Westmoreland's property. The total sale brought $1,348,551.19, which includes proceeds of $319,489.79 for the property upon which appellees were held to have a prior lien. The property upon which appellees were given a prior lien was separately sold, with the right and obligation on the part of the purchaser to remove such property.

The court held against the appellees upon many of the contentions raised by their pleadings, including appellees' claims that the Government's mortgages were void for indefiniteness, that the Government was a joint venturer with Westmoreland, that creditors were third party beneficiaries of the Government-Westmoreland contract, and that equitable considerations barred the Government's priority claim.

The mortgages involved in this case were given as security for Government funds advanced Westmoreland pursuant to the provisions of the Defense Production Act of 1950, 50 U.S.C., Appendix, § 2061 et seq. This act contains a broad declaration of policy and gives the President or his delegate broad powers to maintain the military and economic strength of the nation. Section 2092 authorizes loans to private business to expedite production of materials for national defense, including the mining and development of strategic and critical metals and minerals. "Such loans may be made without regard to the limitations of existing law and on such terms and conditions as the President deems necessary • • •." The Treasury is

required to furnish the funds necessary to make the authorized loans. It was pursuant to this authority that the loan of the funds of the United States was made to Westmoreland.

Westmoreland is a Maryland corporation authorized to do business in Arkansas. The United States, acting through the Defense Materials Procurement Agency, an authorized representative of the President, entered into a contract with Westmoreland on April 7, 1952. Under such contract the Government agreed to purchase manganese ore, upon specified terms, which was to be mined from the ore deposits owned by Westmoreland and processed in a washing and concentrating plant to be constructed within a year on the Westmoreland property. To assist Westmoreland in this undertaking the Government agreed to advance $3,807,250 for land acquisition, construction, and working capital. The contract provides in part:

> "(c) You shall furnish the Government with unencumbered and unqualified mortgages covering the new facilities and all mining property presently owned by you which will be fully paid for through the advance of funds by the Government as prescribed herein. Such mortgages are to be in the form and of the substance prescribed or approved by the Government.
>
> "(d) The Government shall have a lien paramount to all other liens upon the credit balance in the special account or accounts in which the advance payments may be deposited, upon materials produced by you from the facilities, and upon all other assets."

The Real Estate and Chattel Mortgage executed and delivered to the United States on May 22, 1952, states among other things:

> "This mortgage shall constitute a first lien on the mortgaged property.
>
> * * * * * * * *

"That this mortgage and the lien thereof shall extend to any additional premises, property and rights hereafter acquired; and that all such premises, property and rights shall forthwith upon acquisition thereof, and without further act, become subject to this mortgage and the lien thereof."

A supplemental mortgage, also dated May 22, 1952, contains the following provision:

"It being understood that the cost of constructing the proposed manganese washing and concentrating plant (to be erected as provided in Paragraph (B) of Subdivision I aforesaid) is to be paid out of the proceeds of the advances to be made by Mortgagee to Mortgagor as hereinabove set out, it is understood (and notice is hereby given) that the lien of the Mortgagee under said Real Estate and Chattel Mortgage and under this Supplemental Mortgage upon said manganese washing and concentrating plant (and the site thereof) will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien."

These mortgages were properly executed and recorded before construction was commenced by Westmoreland on its new facilities and before any lien now asserted by the appellees attached.

The Government in its brief urges that the court erred in determining the priority of lien issue upon the basis of Arkansas law; that the federal law applies; and that the Government's rights under its contract lawfully entered into can not be affected or limited by provisions of state law. The Government additionally asserts that under Revised Statutes, section 3466, 31 U.S.C., section 191, it is entitled to priority in payment. The appellees contend that the Government did not raise these issues in the trial court and can not adopt a new theory upon appeal.

The Government in its petition sets out in full the contract and mortgages relied upon, and states that they were entered into by the United States pursuant to the provisions of the Defense Production Act of 1950. Priority of the Government mortgages over the appellees' liens is asserted. The Government prays that a first, prior, and paramount lien be established in its favor against the mortgaged property. Appellees, in their answers and crossclaims, deny that their liens are subsequent to the Government's mortgage lien, and assert that their liens are prior to the mortgage lien under the Arkansas Miners' Lien statutes. The Government in its reply denies that appellees have any miners' lien which is superior to the lien created by the Government's prior mortgages.

The trial court recognized that it was necessary to decide what law applies. He determined that Arkansas law controls. It is perhaps entirely true, as contended by appellees, that the argument below was devoted largely to the issue of whether the miner's liens were prior to the mortgage lien under Arkansas law. Doubtless, the trial court did not have the benefit of the briefs furnished this court on the contention that federal law applies. However, the Government, in its reply brief filed here, does set out a brief filed in the trial court on July 22, 1954, in opposition to a motion to dismiss its petition filed by Westmoreland wherein the Government states in part:

> "Before mentioning the merits of defendant's motion, it should be pointed out that in construing contracts executed by the United States of America, particularly those with reference to land, the applicable law is Federal, rather than State. *United States* v. *Allegheny County*, 322 U.S. 174, 182; *Girard Trust Co.* v. *United States*, 149 F.2d 872, 161 F.2d 159 (C.C.A. 3, 1947); *Brooklyn Waterfront Terminal Corporation* v. *United States*, 70 F.Supp. 943, 948 (C.Cls. 1950). • • •"

Appellees contend that this brief was filed with reference to a controversy between the Government and Westmoreland. The factual statement is doubtless correct. Nevertheless, the contract and mortgages involved in Westmoreland are the identical instruments that are involved in the present controversy.

At least to the extent of the issues raised by the pleadings the court is bound to apply the appropriate law. *United States* v. *Certain Parcels of Land in City of Philadelphia et al.*, 3 Cir., 144 F.2d 626, 630; *Ettman* v. *Federal Life Ins. Co.*, 8 Cir., 137 F.2d 121, 127. In the case last cited the trial court relied upon a Missouri statute which this court found to be inapplicable. This court determined the situation was governed by the common law of Missouri. The court states (p. 127):

> "• • • These rules contemplate that every litigant shall have a trial of his case upon its merits and in accordance with the evidence and the applicable law. Whether the Company assumed in its pleadings and upon the trial that it must prove an intent on the part of the insured to deceive is of no consequence. The evidence received was within the issues made by the pleadings, and it was the duty of the trial court to apply the proper rules of law to the fact situation. • • •"

In *United States* v. *Certain Parcels of Land in City of Philadelphia, et al., supra*, the trial court applied the law of Pennsylvania in a Government condemnation case. Upon appeal appellee urged that the case below was tried upon the theory that Pennsylvania law applied, and that appellant could not reply upon a different theory as to controlling law upon appeal. This argument was rejected by the court of appeals. The court states (p. 630):

> "• • • Appellate courts of course have always remanded cases when the trial courts have applied the law of the wrong jurisdiction. *Klaxon Co.* v. *Stentor*

Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477. We think this should be done in this case and it is immaterial that it was tried in the district court on the theory that Pennsylvania law was to be applied. The appropriate law must be applied in each case and upon a failure to do so appellate courts should remand the cause to the trial court to afford it opportunity to apply the appropriate law, even if the question was not raised in the court below. * * *"

We are satisfied that under the pleadings in the present case the court was bound to apply the right law, and that the issue of whether federal common law or Arkansas law should be applied was before the trial court.

An additional problem is raised by the Government's contention that it is entitled to priority under R.S., section 3466. The Government does not plead all of the facts necessary to bring it under the provisions of this statute. The Government apparently relies upon the appointment of the receiver as the act of bankruptcy on the part of Westmoreland which brings the statute into operation. This was not and could not have been pleaded in the original petition as the receiver was subsequently appointed pursuant to the prayer of the Government's petition. The petition was not amended to assert an act of bankruptcy. The Government in its pleadings did not specifically request priority by reason of R.S., section 3466. An appellate court may, in its discretion, in the public interest or in order to prevent a miscarriage of justice, consider an issue not raised in the trial court. *Helvering* v. *Hormel*, 8 Cir., 111 F.2d 1, affirmed 312 U.S. 552, 557; *United States* v. *Harrell*, 8 Cir. 133 F.2d 504, 507; *Frieze* v. *West American Ins. Co.*, 8 Cir., 188 F.2d 331, rehearing denied 190 F.2d 381; *Federal Deposit Insurance Corporation* v. *Vest*, 6 Cir., 122 F.2d 765, 768. The power to consider issues not raised in the trial court should be sparingly exercised. Whether we should exercise such

power here in connection with the Government's assertion of priority under 3466 presents a close question. We find it unnecessary to determine this issue because of the result reached in the determination of other issues before us for consideration.

We believe that the priority of the liens involved in this appeal should be determined by federal law. Article I, section 8 of the Constitution of the United States, gives Congress power to provide for the common defense and general welfare of the United States, and to make all laws necessary and proper to carry into execution powers vested by the Constitution in the Government of the United States or any department thereof. Article VI provides that the Constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land. See *United States* v. *Allegheny County*, 322 U.S. 174, 182. Clearly, Congress was acting within its constitutional power in enacting the Defense Production Act of 1950. This act authorizes the President or his representative to make loans to private businesses to expedite the procurement of strategic materials for national defense. Congress authorized such loans to be made upon such terms as the President deemed necessary. As heretofore set out, the contract and mortgages specified that the Government should have a paramount lien on Westmoreland's assets.

In the *Allegheny case*, *supra*, the Supreme Court of Pennsylvania had held that Pennsylvania could levy ad valorem taxes on personal property title to which was in the Government and which property had become attached to the taxpayer's realty under a Government contract. The Supreme Court reversed, stating in part (p. 183):

> "Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid

the introduction of disparities, confusion and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. * * *"

In *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, the United States sued the bank to recover proceeds of a check it had paid the bank. It was established that the endorsement of the payee, a W.P.A. worker, had been forged. The United States District Court applied the law of Pennsylvania and held for the bank. The court of appeals reversed, 130 F.2d 93, holding that federal rather than state law should be applied. The Supreme Court affirmed, stating (pp. 366-367):

"We agree with the Circuit Court of Appeals that the rule of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. * * * The duties imposed upon the United States and the right acquired by it as a result of the issuance find their roots in the same federal sources. Cf. *Deitrick* v. *Greaney*, 309 U.S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447. In the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."

In *United States* v. *Standard Oil Company of California*, 332 U.S. 301, the Government sued a truck driver for damages caused the Government by reason of injuries inflicted upon a soldier as the result of the truck driver's negligence. The question of whether under such circumstances

federal or state law controlled is thoroughly discussed. It is stated that the great object of *Erie* v. *Tompkins*, 304 U.S. 64, was "to secure in the federal courts, in diversity cases, the application of the same substantive law as would control if the suit were brought in the courts of the state where the federal court sits." The Court continues (pp. 307-308):

> "Conversely there was no purpose or effect for broadening state power over matters essentially of federal character or for determining whether issues are of that nature. The diversity jurisdiction had not created special problems of that sort. Accordingly the *Erie* decision, which related only to the law to be applied in exercise of that jurisdiction, had no effect, and was intended to have none, to bring within the governance of state law matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings. Cf. *Clearfield Trust Co.* v. *United States*, 318 U.S. at 366-368. Hence, although federal judicial power to deal with common-law problems was cut down in the realm of liability or its absence governable by state law, that power remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question.
>
> "In this sense therefore there remains what may be termed, for want of a better label, an area of 'federal common law' or perhaps more accurately 'law of independent federal judicial decision,' outside the constitutional realm, untouched by the *Erie* decision. * * *"

In our present case the Government, under the statute authorizing the loan, had authority to prescribe the conditions of the loan. Pursuant to such authority the Govern-

ment contracted for and obtained a prior and paramount lien upon Westmoreland's property, including such improvements as might be subsequently erected. As heretofore pointed out, the mortgages provide that the Government's lien is to be prior to the lien of any mechanics, materialmen, or labor or any other statutory lien. The Government's mortgages were executed and recorded before any labor or material was furnished by any of the appellees. Consequently, at the time appellees entered into contracts with Westmoreland for labor and materials, they had constructive notice of the terms of the Government's mortgages. This fact may not be of any particular significance in the determination of this case, but it is an answer to the equitable claims of the appellees. The validity of the Government's mortgages in all respects has been confirmed by the judgment that has been entered. The Government, by virtue of a valid contract, authorized by the Constitution and statutes of the United States, bargained for and obtained a paramount lien upon Westmoreland's property. We can see no reason why the Government should not be in as good a position under a valid contractual lien as it would be under a lien created by statute.

The federal courts have had occasion, in connection with cases arising under the priority granted by 3466, to discuss what type of lien will defeat the priority granted the Government by such section. To avoid confusion we state that we are not basing our decision in the present case in any way upon the provisions of 3466, but are citing cases decided under such statute merely for the purpose of illustrating the status given to state liens by federal courts. In *United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, the issue was whether, in a state court proceeding under a general assignment for the benefit of creditors, section 3466 gives priority to the claim of the United States over a landlord's lien and a municipal tax lien.

The Supreme Court states that it is not expressly decided whether the Government's 3466 priority could be defeated by a specific and perfected lien upon the property at the time of insolvency or voluntary assignment, and again finds it does not reach that problem since it is satisfied the asserted liens are not specific and perfected. The Virginia court had held in effect that the liens were specific and perfected. In reversing the Supreme Court states (pp. 356-357):

> "• • • But it is a matter of federal law as to whether a lien created by state statute is sufficiently specific and perfected to raise questions as to the applicability of the priority given the claims of the United States by an act of Congress. If the priority of the United States is ever to be displaced by a local statutory lien, federal courts must be free to examine the lien's actual legal effect upon the parties. A state court's characterization of a lien as specific and perfected, however conclusive as a matter of state law, cannot operate by itself to impair or supersede a long-standing Congressional declaration of priority. • • •"

The Court then holds that under federal law the liens are not specific and perfected but are merely caveats of a more perfect lien to come. See also *County of Spokane, Washington* v. *United States*, 279 U.S. 80; *Illinois* v. *Campbell*, 329 U.S. 362; *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361. Professor Frank R. Kennedy, in an article in 63 Yale Law Journal 905, after discussing numerous cases arising under section 3466, states (pp. 918-919):

> "The remarkable progeny of *Spokane County* subordinated statutory liens to the federal claim, even though the Government had no lien. The condemned category of the inchoate and general lien, created by the Court and continually enlarged to include each new lien coming before it, has come to embrace practically every lien to be found in modern American law. And in order to avoid facing the supposedly unresolved question whether a specific and perfected

lien is superior to the federal priority, the Court has always been successful in finding one feature suggestive of inchoateness. * * *"

Section 3670 of the Internal Revenue Code of 1939 provides for a lien in favor of the United States for taxes. This statute does not in terms confer priority upon tax liens. *United States* v. *New Britain*, 347 U.S. 81, 84. In *United States* v. *Acri*, 348 U.S. 211, the issue was the relative priority between an attachment lien and a 3670 tax lien. The district court and the court of appeals found the attachment lien to be prior. The Supreme Court reversed on the question of the applicable law. The Supreme Court says (p. 213):

> "The relative priority of the lien of the United States for unpaid taxes is, as we said in *United States* v. *Waddill Co.*, 323 U.S. 353, 356, 357; *Illinois* v. *Campbell*, 329 U.S. 362, 371; *United States* v. *Security Trust Co.*, 340 U.S. 47, 49, always a federal question to be determined finally by the federal courts. The state's characterization of its liens while good for all state purposes, does not necessarily bind this Court. * * *"

See also *United States* v. *Security Trust Co.*, 340 U.S. 47, 49.

United States v. *White Bear Brewing Co.*, 7 Cir., 227 F.2d 359, involved a determination of the question of priority between a mechanic's lien and a tax lien. In that case the work had been completed, the mechanic's lien had been filed in the manner required by state law, and proceedings for the foreclosure of the lien were commenced before the assessment list was received by the collector and before the assessment was made and notice thereof filed. The court of appeals, in a carefully considered opinion, held the mechanic's lien claimant entitled to priority over the tax lien. The Supreme Court reversed without

opinion. 350 U.S. 1010. The effect of the reversal was to determine the tax lien to have priority over the mechanic's lien. See dissenting opinion, *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010. To the same effect see *United States* v. *Colotta*, 350 U.S. 808.

The decisions of the Supreme Court heretofore discussed appear to establish quite definitely that a federal priority or federal lien will prevail over any lien that is not specific and perfected. The Supreme Court has uniformly held that, as against federal priorities or liens, the question of whether the lien asserted against the Government claim is specific and perfected is always a federal question. In *White Bear Brewing Co.*, *supra*, much more was done in the way of perfecting the labor and materialman's lien than was done in the present case. There the work had been completed, the lien had been filed, and foreclosure had commenced before the Government tax lien was asserted. In our present case no materials had been delivered or work performed until after the Government's mortgages had been executed, delivered and recorded.

The Government also urges that the court erred in determining that under Arkansas law the miner's liens are superior to a prior mortgage lien, and also in determining that the miner's lien statute is applicable under the facts in this case. The court's opinion discloses that he has made a careful and exhaustive study of the applicable Arkansas cases, and it is very probable that he reached a permissible conclusion on the basis of Arkansas law. The court frankly states that his decision is based upon Arkansas law. He also states (p. 942):

> "* * * The priority of a mechanic's lien under Arkansas law, however, does not depend upon the quality of the lien as 'choate' or 'inchoate', but rather upon the time at which the lien attaches, which is when the first materials are furnished. * * *"

The trial court erred in determining the priority issue before it on the basis of Arkansas law rather than upon the basis of federal common law as developed by the Supreme Court of the United States in the cases we have heretofore discussed.

The question remains as to whether this case should be remanded to the trial court for the purpose of taking additional evidence and for additional fact determinations. In *Frieze* v. *West American Ins. Co.*, *supra*, the test to be applied in the event new issues are considered by the appellate court is stated as follows (p.382):

> "* * * Where such new issues are considered by the appellate court, the case will be remanded for decision, by the trial court, of any uncertain or disputed facts related to such issues. Where the new issues involve undisputed facts, the appellate court may reverse and remand with directions to the trial court to proceed in accord with the decision of the appellate court."

As heretofore stated, we doubt whether the question of what law is applicable is a new issue. In any event, the application of the foregoing test to the record in this case satisfies us that the evidence relative to the priority of the respective liens was fully developed in the trial court, and that there is no occasion to remand this case to the trial court for further testimony or fact findings.

We are satisfied that under federal law the appellees' miner's liens were inchoate and were not specific and perfected at the time the lien of the Government mortgages attached to the Westmoreland property. It is therefore our conclusion that the Government's mortgage lien is prior to the liens of the appellees.

The judgment appealed from is reversed, and this case is remanded to the trial court for further proceedings not inconsistent with the views expressed in this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

II. *Judgment of Court of Appeals*

APPENDIX A

JUDGMENT

United States Court of Appeals for the Eighth Circuit

No. 15547—September Term, 1956.

Wednesday, June 26, 1957.

United States of America, Appellant, v. Latrobe Construction Company, Bragg's Electric Construction Company, Arkansas Foundry Company, General Steel Products Company, Jeffery Lumber Company, Padgett Lumber Company, Choctaw, Inc., Ira Sherrill, Mill & Mine Supply Company and Crow-Burlingame Company.

Appeal from the United States District Court for the Eastern District of Arkansas.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause, be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the views expressed in the opinion of this Court this day filed herein.

June 26, 1957.

APPENDIX B

I. *Defense Production Act of* 1950

(Act September 8, 1950, C.932, 64 Stat. 798)

Title 50 *U.S.C.A.* § 2062, 2092 *and* 2093

"§2062. Declaration of policy.

It is the policy of the United States to oppose acts of aggression and to promote peace by insuring respect for world law and the peaceful settlement of differences among nations. To that end this Government is pledged to support collective action through the United Nations and through regional arrangements for mutual defense in conformity with the Charter of the United Nations. The United States is determined to develop and maintain whatever military and economic strength is found to be necessary to carry out [its] purpose. Under present circumstances, this task requires diversion of certain materials and facilities from civilian use to military and related purposes. It requires expansion of productive facilities beyond the levels needed to meet the civilian demand. In order that this diversion and expansion may proceed at once, and that the national economy may be maintained with the maximum effectiveness and the least hardship, normal civilian production and purchases must be curtailed and redirected.

It is the objective of this Act (sections 2061-2166 of this Appendix) to provide the President with authority to accomplish these adjustments in the operation of the economy. It is the intention of the Congress that the President shall use the powers conferred by this Act (said sections) to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and

foreign policy objectives, and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian use, within the framework, as far as practicable, of the American system of competitive enterprise. September 8, 1950, c.932, § 2, 64 Stat. 798."

* * * * * * *

"§2092. Loans to private business enterprises.

To expedite production and deliveries or services to aid in carrying out Government contracts for the procurement of materials or the performance of services for the national defense, the President may make provision for loans (including participations in, or guarantees of, loans) to private business enterprises (including research corporations not organized for profit) for the expansion of capacity, the development of technological processes, or the production of essential materials, including the exploration, development, and mining of strategic and critical metals and minerals. Such loans may be made without regard to the limitations of existing law and on such terms and conditions as the President deems necessary, except that financial assistance may be extended only to the extent that it is not otherwise available on reasonable terms. September 8, 1950, c.932, Title III, § 302, 64 Stat. 801."

"§2093. Purchases of raw materials and installation of equipment—(a) Purchases for use or resale; development of strategic minerals and metals; * * *

To assist in carrying out the objectives of this Act (sections 2061-2166 of this Appendix) the President may make provision (1) for purchases of or commitments to purchase metals, minerals, and other materials, for Government use or resale; and (2) for the encouragement

of exploration, development, and mining of critical and strategic minerals and metals: *Provided however*, That purchases for resale under this subsection shall not include that part of the supply of an agricultural commodity which is domestically produced except insofar as such domestically produced supply may be purchased for resale for industrial uses or stockpiling, and no commodity purchased under this subsection shall be sold at less than the established ceiling price for such commodity (except that minerals and metals shall not be sold at less than the established ceiling price, or the current domestic market price, whichever is lower), or, if no ceiling price has been established, the higher of the following: (i) the current domestic market price for such commodity, or (ii) the minimum sale price established for agricultural commodities owned or controlled by the Commodity Credit Corporation as provided in section 407 of Public Law 439, Eighty-first Congress (section 1427 of Title 7): *Provided further, however*, That no purchase or commitment to purchase any imported agricultural commodity shall be made calling for delivery more than one year after the expiration of this Act (June 30, 1952).

TERMS AND CONDITIONS OF PURCHASES

(b) Subject to the limitations in subsection (a) (of this section) purchases and commitments to purchase and sales under such subsection may be made without regard to the limitations of existing law, for such quantities, and on such terms and conditions, including advance payments, and for such periods, but not extending beyond June 30, 1952, as the President deems necessary except that purchases or commitments to purchase involving higher than established ceiling prices (or if there be no established ceiling prices, currently prevailing market prices) or anticipated loss on resale shall not be made unless it is determined that supply of the materials could

not be effectively increased at lower prices or on terms more favorable to the Government, or that such purchases are necessary to assure the availability to the United States of overseas supplies."

II. *Pertinent Portions of the Arkansas Miners' Lien Law*

(5 Ark. Stats. (1947), Sec. 51-701 et seq.)

"§51-701. Contracting laborers and materialmen entitled to lien—Lien on leasehold interest.

Any person, corporation, firm, association, partnership, materialmen, artisan, laborer or mechanic, who shall under contract, express or implied, heretofore or hereafter made, with the owner or lessee of any land, mine or quarry, or the owner of any gas, oil or mineral leasehold interest in land, or the owner of any gas pipe line or oil pipe line, or owner of any oil or gas pipe line right of way, or with the trustee, agent or receiver of any such owner, perform labor or furnish fuel material, machinery or supplies, used in the digging, drilling, torpedoing, operating, completing, equipping, maintaining or repairing any such oil or gas well, water well, mine or quarry, or oil or gas pipe line, including any and all tanks or other receptacles used or intended for the storage of oil, regardless of where such oil is produced shall have a lien on the whole of such land or leasehold interest therein, or oil pipe line, or gas pipe (such land or leasehold interest therein, or oil pipe line, or gas pipe) line, including the right of way for same, or lease for oil and gas purposes, the buildings and appurtenances, and upon the materials and supplies so furnished, and upon said oil well, gas well, water well, oil or gas pipe line, mine or quarry for which same are furnished, and upon all of the other oil wells, gas wells, buildings and appurtenances, including pipe line, leasehold interest and land used in operating for oil, gas and other minerals, upon such leasehold, or land or pipe line and

the right of way therefor, for which said material and supplies were furnished or labor performed, whether the same are movable or not. Provided, that if labor supplies, machinery, or material is furnished to a leaseholder the lien hereby created shall not attach to the underlying fee title to the land.

"§51-704. Priority of lien.

The lien hereby given against the land or leasehold interest therein and the oil pipe line or gas pipe line, including the right of way for same, and lease for oil and gas purposes, including the buildings and appurtenances situated thereon, upon the materials and supplies so furnished and upon said oil well, gas well, water well, oil or gas pipe line, mine or quarry for which such materials were furnished, or labor performed and upon all other oil wells, gas wells and water wells on such lands shall be prior and paramount to and in preference of any and all subsequent liens, encumbrances and mortgages and except as hereinafter provided all liens established hereunder shall be of equal dignity. The lien herein provided for shall attach to the machinery, material, supplies and the specific improvements made, in preference to any prior lien or encumbrance or mortgage upon the land or leasehold interest upon which the said machinery, material, supplies or specific improvements are placed or located, provided, however, that any lien, encumbrance, or mortgage upon the land or leasehold interest at the time of the inception of the lien herein provided for, shall not be affected thereby; and the holders of such liens upon such land or leasehold interest shall not be necessary parties in suits to foreclose the lien hereby created.

III. *State Laws as Rules of Decisions*

(*Title* 28, *U.S.C.A.*, §1652)

"§1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c.646, 62 Stat. 944.

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REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 516

LATROBE CONSTRUCTION COMPANY,
BRAGG'S ELECTRIC CONSTRUCTION COMPANY,
ARKANSAS COMPANY,
GENERAL STEEL PRODUCTS COMPANY,
JEFFERY LUMBER COMPANY,
PADGETT LUMBER COMPANY,
CHOCTAW, INC.,
IRA SHERRILL,
MILL AND MINE SUPPLY COMPANY,
CROW-BURLINGAME COMPANY — *Petitioners*

v.

UNITED STATES OF AMERICA — *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

LATROBE CONSTRUCTION COMPANY,
BRAGG'S ELECTRIC CONSTRUCTION COMPANY,
ARKANSAS COMPANY,
GENERAL STEEL PRODUCTS COMPANY,
JEFFERY LUMBER COMPANY,
PADGETT LUMBER COMPANY,
CHOCTAW, INC.,
IRA SHERRILL,
MILL AND MINE SUPPLY COMPANY,
CROW-BURLINGAME COMPANY *Petitioners*

v.

UNITED STATES OF AMERICA *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE LATROBE CONSTRUCTION COMPANY *ET AL*

The Government states that the question presented is "whether prior federal mortgage liens are entitled to priority over subsequent state miners' liens". As it is clear that the Court of Appeals placed its decision on the granting of a "contractual" lien in favor of the Government, rather than upon an express statutory lien in favor of the Government, we feel that the statement of the issues as outlined in detail on pages 2 and 3 of the petition for certiorari presents the questions to be determined.

In an appendix attached as page 11 to this reply brief, we are listing each case cited by the Government on the issue of priority in Section One of its Argument and

enumerating therein the Federal statute under which the lien was granted. We believe that this will clearly show that the issue which we have presented is not governed by the cases cited by the Government, as all involved express statutory liens. The Government did not cite a single case based on the "contractual" lien theory, and we submit that if this entirely new approach to the granting of priority is to be adopted, that it should be adopted by Congress. Since our petition was filed the case of *Flood* v. *U. S.*, 247 Fed. 209 (C.A.1, July, 1957), has come to our attention and the court there stated:

> "If the far-reaching step of upsetting the well established system of priority maritime liens should be taken, it seems to us that Congress is much better equipped to work out a comprehensive solution of problems involved, for example, to determine which type of maritime claims will be relegated to a position junior to a tax claim of the government and which type of maritime liens will remain superior to it."

The Government insists that certiorari should not be granted as the Government was entitled to priority under Section 5 of Act of March 3, 1797, 1 Stat. 512, 515, as amended R.S. 3466. We did not in our original petition mention this point as it was not considered by the trial court. In fact, it was not even brought to the attention of the trial court and the Court of Appeals did not base it decision on any relief afforded the Government under 31 U.S.C. 191 (A8 and A12).

However, since the issue has now been raised, we would like to present to this Court the same factual picture that was presented to the Court of Appeals by chronological statement of the case. We are outlining the twelve steps in this case as appeared in our brief in the Court of Appeals, using verbatim the language used in presenting the issue to that court.

ARGUMENT

1. The complaint was filed on January 8, 1954. No mention of any Federal statute or Federal law as to priority was alleged. There is a general allegation found in Section 9 of the complaint (R.18). It is as follows: 'All rights of the defendants named in sub-paragraphs A, B and C of this paragraph IX in and to the property mortgaged to the plaintiff are subsequent, inferior and subordinate to the rights of the United States of America under the real estate and Chattel Mortgage and the supplemental mortgage mentioned hereinabove.' This is simply a conclusion of law. All that the prayer for relief stated was that the Government should be granted a 'First, prior and paramount lien' (R.22). The complaint followed in meticulous detail the standard Arkansas allegations in mortgage foreclosures in that a Lis Pendens was filed in the counties in which the propery was located, in that all know lien claimants were made parties, in that equity of redemption under Arkansas law was sought to be foreclosed, in that a receiver was requested. The complaint did allege jurisdiction of the action by virtue of Sec. 1345, Title 28 U.S. Code and Sec. 2156 (b), Title 50 App. U.S. Code (R.3). This allegation is relevant in that it did show that Government counsel did plead whatever statutes that they deemed at that time necessary to present their theory of the lawsuit.

2. Typical of the answers filed by the defendant lien claimants is the answer and cross-complaint of Padgett Lumber Co., filed on February 25, 1954. At that time the lien claimant expressly set forth its contention as follows:

> "It admits this defendant's claim of liens as alleged in paragraph IX of the Complaint, but states that the lien claimed by this defendant, Padgett Lumber Company, in addition to being a mechanic's and or materialman's lien generally as provided by Sections 51,601 to 51,631, both inclusive, of Arkansas Statutes of 1947, Annotated is also a 'Miner's Lien' as provided by Sections 51,701 to 51,714, both inclusive, of Arkansas Statutes of 1947, Annotated. This Defendant alleges that its said liens are superior to plaintiff's claim of lien, and denies that this defendant's said liens are in any manner subsequent, inferior or subordinate to a claim of lien by the plaintiff through any source."

Also, the allegations are set out in detail in paragraph 15 of the answer (R.89). Thus, at the very outset of this protracted litigation the position of the lien claimants is set out.

3. The Government twice later amended its complaint, on June 21, 1954 (R.143), and on October 27, 1954 (R.151), but no allegation of any Federal Statute or any Federal law being applicable to the foreclosure suit was made.

4. On January 21, 1955, the Government filed its answer to the pleadings of the lien claimants. The Government denied that the lien claimants had a Miners' Lien (R.158) and at this stage of the litigation it was clear that the case was an adversary one in that the lien claimants had filed about 11 months earlier their pleadings, the Government still made no mention of any Federal statute or Federal law.

5. On January 20, 1955, the Government filed its pretrial brief, consisting of 23 pages, and the entire brief was devoted to Arkansas law, but failed to remotely hint that the Government had any theory of the law suit other than to try all of the issues under Arkansas law.

6. Later the Government filed its request for Conclusions of Law (Appellees' Supp. R.21-23), and no mention of any Federal Statute or of any Federal law is made.

7. On August 23, 1955, some 18 months after the original complaint was filed, the Government filed its final brief on the priority question. It consisted of 50 pages and discussed in great detail all of the claims put forth by the lien claimants, but again failed to urge as a defense any Federal statute or any Federal law.

Thus, the case was submitted to the Court after mature consideration by all parties, and after all parties had been given ample time to develop all applicable law, with all parties involved, the Government, the Lien Claimants and the Court directing their attention to the issues as formulated by the pleadings and the evidence introduced.

8. The Trial Court announced its decison on the priority question in an opinion of 55 pages in September, 1955 (R.172-231). The statement made in the opinion that Arkansas law was applicable was the only statement that could have been made in the case on the theories presented by all parties to the court.

9. The Government did not later bring to the attention of the District Court any contention that Federal statute or Federal law was applicable, by motion for amendment to findings under Rule 52 (b).

10. The Special Master proceeded to sell the property covered by the mortgage under Arkansas law as to notice, place of sale and other Arkansas requirements which were fully met.

11. The Government filed its notice of appeal on December 23, 1955, and there designated for the first time

that Federal law was applicable. It will be noted that this designation does not refer to any Statute nor does it in any way define the Federal law under which it now claims,

12. Counsel for lien claimants had no knowledge of any kind that the Government was relying on Sec. 3466, 31 U.S.C. Sec. 191, or that the Government had now shifted its claim to Federal law until the summer of 1956 when the brief was received."

At that time we challenged the Government to show where at any time in the trial court it had claimed that Federal law was applicable. The Government attempted to meet this challenge by quoting from a brief that it had filed in a matter not involving the petitioners and on page seven of the reply brief of the Government in the Court of Appeals, the petitioners' point is well established as the Government did not send a copy of this brief to the counsel for the petitioners. We might further add that the issue before the trial court, even as concerned Westmoreland Manganese Corporation, was not involved in any way in the terse preliminary statements in the Government's brief.

United States v. *Waechter*, 195 Fed. 2d 963 (C.A. 9th, 1952), and *United States* v. *Hoth*, 207 Fed. 2d 386 (C.A. 9th, 1953), clearly establish the rule that the fact that the Government is a party now urging a right to adopt a new theory and claim a new defense does not place the case on any stronger basis than that of private litigants.

The following cases all support the holding that a new theory of law will not be considered except "where the obvious result would be a plain miscarriage of justice". Ample refutation of such a charge is found in the opinion of the District Court dealing with every issue before that court. See *Mandel Bros.* v. *Henry A. O'Neil, Inc.*

69 Fed. 452 at 457 (C.A. 8, 1934); *Buffington* v. *Owosso Mfg. Co.*, 105 Fed. 2d 692 at 696 (C.A. 8, 1939); *Sisco* v. *McNutt*, 209 Fed. 2d 550 (C.A. 8, 1954); *Torpey* v. *Red Owl Stores, Inc.*, 228 Fed. 2d 117 (C.A. 8, 1955); *Albert Milling Co.* v. *Faubus Produce Co.*, 222 Fed. 1915 (C.A. 8, 1955); and *Commerce Trust Co.* v. *Chandler*, 284 Fed. 737 (C.A. 1, 1922).

It was plain to counsel for petitioners why the Government did not allege priority under 31 U.S.C. 191, in the petition in the District Court. This would have placed upon the Government the burden of proving insolvency in a contested proceeding and in a case where the mortgagee, the Westemoreland Manganese Corporation, in the words of the government supervisors had a contract that was practically a cost-plus contract. The litigation was protracted, lasting over many months, and no mention of proof of insolvency was ever made and in fact, the Government's case finally was based upon the validity of an amendment to the contract between the government and Westmoreland.

If the Government were allowed to claim that it could later adopt a new theory, then in effect the petitioners herein have never had an opportunity to contest the case. The statute now asserted by the Government is an ancient one daily used by the Department of Justice. It is inconceivable that the statute was overlooked by the skilled trial consel of the Government. The Petitioners are asking only that the Government now be precluded from moving the goal posts and changing the rule books in the middle of the game.

The third question that we presented in our petition was whether or not the Government may prevail under an after acquired property clause in its mortgage over the statutory miners' liens of the petitioners when the

mortgagor's title or improvements are created by the material sold or labor performed by the mining lien claimants, the petitioners herein. The only answer of the Government to this is found in their statement, "Thus, when the title to the various materials became vested in Westmoreland, they were not burdened with mechanics' or materialmen's liens." We submit that this begs the entire question presented. What time did title transfer and was the property burdened with the liens at the time of the transfer, were questions that were considered by the trial court and the Court of Appeals did not consider this problem in its opinion. The Government states that "equitable considerations would allow the Government to prevail". In determining whether or not which lien claimant should prevail in a contest between parties claiming after acquired clause in mortgage and a mining lien claimant, it is necessary to consider equitable issues and the trial court pointed this issue up when it stated at page 215 of the record:

> "After all, it must be kept in mind that but for the services and materials supplied by the lien claimants and others there would be no improvements on the property."

Then after refusing to accept the "relation back" theory as urged by the Government, the Court stated on page 215:

> "Assuming, however, that there is such a 'relation back' the same is a fiction and should not be indulged in so as to defeat the rights of suppliers who furnished the very materials to which the mortgagee's lien attached. As was said in the Bear Lake case, *supra*, 'the actual fact will be considered and not the fiction, 164 U.S. at 23'."

We believe that the Bear Lake case is in direct conflict with the holding of the Court of Appeals and that

this conflict alone provides sufficient grounds for the granting of the writ of certiorari.

Questions two and four as outlined in our petition are issues that are presented clearly by the petition and by the reply.

CONCLUSION

Since the Government has now raised the issue of the applicability of 31 U.S.C. 191, to this case, we request that this issue be submitted as one of the questions in this case: "Should the Government be allowed to adopt on appeal a new theory and claim a new defense which was not within the pleadings in the trial court and which defense was never brought to the attention of the trial court?" It is respectfully submitted that the petition for a writ of certiorari be granted by this Court.

Respectfully submitted,

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APPENDIX A

TABLE OF CASES CITED BY GOVERNMENT

Case	*Statutes Under Which Priority Allowed*
United States v. *Waddill Co.*, 323 U.S. 353	Section 3466 of Revised Statutes, 31 U.S.C.A. 191
United States v. *Gilbert Associates, Inc.*, 345 U.S. 361	3672 of Internal Revenue Code, 56 Stat. 798, 26 U.S.C.A. (1946 Ed.) 26 U.S.C.A. 3672; Section 3466 of Revised Statutes, 31 U.S.C.A. 191
Spokane County v. *United States*, 279 U.S. 80	U. S. Rev. Statutes, Section 3466
Illinois v. *Campbell*, 329 U.S. 362	Social Security Act 801, 802, 804, 807 (c), 42 U.S.C.A. 1000, 1002, 1004, 1007(c); 26 U.S.C.A., Internal Revenue Code 1400, et seq; 31 U.S.C.A. 191; Bankruptcy Act No. 3, Sub A, 11 U.S.C.A. 21
United States v. *White Bear Brewing Co.*, 350 U.S. 1010	26 A.S.C. 3670, 26 U.S.C.A. 3670

United States v. *Colotta*, 350 U.S. 808	Reversed per curiam
United States v. *Aeri*, 348 U.S. 211	26 U.S.C.A. 3672
United States v. *Scovil*, 348 U.S. 211	26 U.S.C.A., 3670-3672; 31 U.S.C.A. 191
United States v. *Liverpool and London Ins. Co.*, 348 U.S. 215	26 U.S.C.A., 3670-3672; 31 U.S.C.A. 191
United States v. *Security Trust and Savings Bank*, 340 U.S. 47	26 U.S.C.A. 3670-3672
United States v. *New Britain*, 347 U.S. 81	26 U.S.C.A., 3670; 31 U.S.C.A. 191
Rankin v. *Scott*, 12 Wheat 177, 179	No Federal Statute and no Government lien involved.
United States v. *City of Greenville*, 118 F. 2d 963 (C.A.4)	26 U.S.C.A., Int. Rev. Code §§ 3670-72; 3678
Paul v. *United States*, 127 F. 2d 64, (C.A.6)	Rev. Act 1926 § 315(a); 26 U.S.C.A. Int. Rev. Acts, p. 253; Rev. Act 1928 § 613(a); 26 U.S.C.A. Int. Rev. Acts, p. 461.

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Act of March 3, 1797, 1 Stat. 512, Section 5, as amended, R. S. 3466, 31 U. S. C. 191 ..... 6, 9, 10
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 516

LATROBE CONSTRUCTION COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. A1–A16) is reported at 246 F. 2d 357. The opinion of the District Court is reported in 134 F. Supp. 898, 917–950.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1957 (Pet. A17). A timely petition for

[1] The portion of the District Court's opinion reported at 134 F. Supp. 898 to the beginning of the "Second Memorandum" on page 917 concerns its holding that the Government was entitled to judgment against the Westmoreland Manganese Corporation for the Government's principal claim and to foreclosure of its real estate and chattel mortgage and supplement thereto. That portion of the decision was affirmed (*Westmoreland Manganese Corporation* v. *United States*, 246 F. 2d 351 (C. A. 8), and no further review has been sought.

rehearing was denied on August 7, 1957. The petition for a writ of certiorari was filed September 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether prior federal mortgage liens are entitled to priority over subsequent state miners' liens.

STATUTE INVOLVED

The pertinent portions of the Arkansas Miners' Lien Law, relied upon by the petitioners are set out in the petition (Pet. B4–B5).

STATEMENT

The Court of Appeals reversed the district court's determination that prior federal mortgage liens were not entitled to priority over subsequent state miners' liens, the district court having based its decision on Arkansas law rather than federal law as developed by this Court (Pet. A16). As noted by the Court of Appeals, the "complicated facts" (Pet. A2) are set out in detail by the district court in its opinion reported at 134 F. Supp. 898, 917. The essential facts may be summarized as follows:

This is a mortgage foreclosure action brought by the United States against the Westmoreland Manganese Corporation. Under the provisions of the Defense Production Act of 1950, 50 U. S. C., App. 2061 *et seq.*, the Government had advanced a total of over $2,877,081 to Westmoreland to assist in the construction and operation of a manganese ore washing and concentrating plant to be constructed

within a year by Westmoreland on its property (R. 22–24, 246, 250). As security for its advances the Government was to be given "unencumbered and unqualified mortgages" (R. 30) covering the new facilities and all mining properties then owned by Westmoreland, and the contract further provided (R. 30):

> (d) The Government shall have a lien paramount to all other liens upon the credit balance in the special account or accounts in which the advance payments may be deposited, upon materials produced by you from the facilities, and upon all other assets.

Mortgage instruments, duly executed and recorded, mortgaged to the United States all the property of Westmoreland, then owned or thereafter acquired, whether such property be real, personal of mixed (R. 35–52, 162, 247). Among the provisions of the Real Estate and Chattel Mortgage are the following (R. 38, 44):

> This mortgage shall constitute a first lien on the mortgaged property.
>
> * * * * *
>
> That this mortgage and the lien thereof shall extend to any additional premises, property and rights hereafter acquired; and that all such premises, property and rights shall forthwith upon acquisition thereof, and without further act, become subject to this mortgage and the lien thereof * * *.

The Supplemental Mortgage, which was described therein as being cumulative to the Real Estate and Chattel Mortgage (R. 52), provided in all-embracing

detailed description the various items covered by the mortgage (R. 48–49) and continued (R. 51):

IV

> It being understood that the cost of constructing the proposed manganese washing and concentrating plant (to be erected as provided in Paragraph (B) of Subdivision I aforesaid) is to be paid out of the proceeds of the advances to be made by Mortgagee to Mortgagor as hereinabove set out, it is understood (and notice is hereby given) that the lien of the Mortgagee under said Real Estate and Chattel Mortgage and under this Supplemental Mortgage upon said manganese washing and concentrating plant (and the site thereof) will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien.

At the time of the recordation of the mortgage instruments, Westmoreland had no other debts, other than that owing to the United States, which could be the basis for an encumbrance of its property (R. 249).

Petitioners furnished goods or services to Westmoreland during the construction of its plant. "The Government's mortgages were executed and recorded before any labor or material was furnished by any of the appellees [petitioners]" (Pet. A12). The Westmoreland project failed and the instant action ensued. Upon motion by the United States for the appointment of a receiver *pendente lite*, the district court found as a fact that Westmoreland was insolvent, appointed a receiver, and ordered that said re-

ceiver take possession of all property of Westmoreland, whether real, personal or mixed (R. 164, 168–171). There was no appeal from that order. After trial, the district court adjudged that the United States was entitled to a money judgment and to foreclosure.[2]

While rejecting several contentions of the petitioners (R. 174–193), the district court was of the opinion that petitioners were entitled, by virtue of the Arkansas 'Miners' Lien Statute (Ark. Stats. (1947), sec. 51–701, *et seq.*, Pet. B4–B5) to priority over the Government's mortgage liens with respect to the partially completed building improvements and with respect to materials which had been furnished, but not actually used, in the construction of the new improvements (R. 174, 193, 204–205).[3] The district court considered the question "to be entirely one of Arkansas law" (R. 193). Westmoreland's property was sold for a total of $1,348,551.19, which was insufficient to satisfy the judgment in favor of the United States. Those items of property as to which petitioners were held to be entitled to priority were sold for a total of $319,489.79.

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[2] The district court's memorandum opinion on this phase of the case (134 F. Supp. 898, 904–917) has been affirmed. *Westmoreland Manganese Corp.* v. *United States*, 246 F. 2d 351 (C. A. 8).

[3] Inasmuch as petitioners had not furnished any materials for the new facilities until after recordation of the Government's mortgages, petitioners conceded and the district court held that the mortgage lien was paramount to the statutory liens with respect to the lands of Westmoreland and the improvements existing thereon at the time of recordation of the mortgages (R. 174–175, 205–206).

In its opinion on an appeal by the Government, the Court of Appeals reviewed the contract and mortgage provisions for unencumbered and unqualified mortgages to constitute a first lien on the mortgaged property (Pet. A4–A5). It then discussed the Government's contentions that federal law applied and that the Government's rights under its contract lawfully entered into cannot be affected or limited by provisions of state law; and the Government's further contention that under R. S. 3466, 31 U. S. C. 191 (*infra*, p. 9), it is entitled to priority in payment (Pet. A5–A6). The Court of Appeals went on to hold that at least to the extent of the issues raised by the pleadings it was bound to apply the appropriate law and that, under recent decisions of this Court, federal law controlled (Pet. A7–A8). It then concluded that because of the result reached in the determination of other issues it was unnecessary to determine whether the Government was entitled to priority under R. S. 3466 (Pet. A8–A9). The Court of Appeals held that under federal law the petitioners' miners' liens were inchoate and were not specific and perfected at the time the Government mortgages attached to the Westmoreland property so that the Government's mortgage liens are prior to the liens of the petitioners (Pet. A16). Accordingly, the Court of Appeals reversed the judgment of the district court (Pet. A16). A motion for rehearing by the petitioners was denied on August 7, 1957.

ARGUMENT

1. While growing out of a somewhat complicated factual situation, the single issue here presented—whether prior federal mortgage liens are entitled to priority over subsequent state miners' liens—has been clearly resolved in favor of such priority, as shown by numerous decisions of this Court.

This case involves federal mortgages, and the liens created thereby, and the Court has made it clear beyond cavil that Government contracts "or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367; *United States* v. *Standard Oil Co.*, 332 U. S. 301, 308–310; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 121–123. The Court of Appeals was obviously correct in holding that "The trial court erred in determining the priority issue before it on the basis of Arkansas law rather than upon the basis of federal common law as developed by the Supreme Court of the United States * * *" (Pet. A16).

Even if the mortgage liens of the United States had not been prior in time and so entitled to priority on that basis (*United States* v. *New Britain*, 347 U. S. 81, 85; *Rankin* v. *Scott*, 12 Wheat. 177, 179; *United States* v. *City of Greenville*, 118 F. 2d 963, 966 (C. A. 4); *Paul* v. *United States*, 127 F. 2d 64, 66 (C. A. 6), petitioners had done nothing under their state statutory liens to divest the property owner of either title

or possession. Thus, as pointed out by the Court of Appeals (Pet. A12–A15), recent decisions by this Court have made it clear that under federal law such liens as here created by state statute "are not specific and perfected but are merely caveats of a more perfect lien to come" (Pet. A13). *United States* v. *Waddill Co.*, 323 U. S. 353, 358–360; *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 365–366; *Spokane County* v. *United States*, 279 U. S. 80, 93–94; *Illinois* v. *Campbell*, 329 U. S. 362, 370–376.

In a series of cases this Court has recently awarded priority to the United States as against various types of nonfederal liens. *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010, reversing 227 F. 2d 359 (C. A. 7), rehearing denied, 351 U. S. 958; *United States* v. *Colotta*, 350 U. S. 808; *United States* v. *Acri*, 348 U. S. 211; *United States* v. *Scovil*, 348 U. S. 218; *United States* v. *Liverpool & London Ins. Co.*, 348 U. S. 215; *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47. In view of these recent pronouncements by this Court, it is clear that the Court of Appeals was sound in its conclusion that (Pet. A16):

> We are satisfied that under federal law the appellees' [petitioners'] miner's liens were inchoate and were not specific and perfected at the time the lien of the Government mortgages attached to the Westmoreland property. It is therefore our conclusion that the Government's mortgage lien is prior to the liens of the appellees.

2. While the Court of Appeals found it unnecessary to pass on the matter because of its determination of other issues (Pet. A8–A9), it should be noted that, even without regard to the special provisions of the contract and mortgages, the Government's debt should be first satisfied from the assets of Westmoreland. By Section 5 of the Act of March 3, 1797, 1 Stat. 512, 515, as amended, R. S. 3466, 31 U. S. C. 191, Congress has declared:

> Whenever any person indebted to the United States is insolvent * * *, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

By virtue of this federal statute, the claim of the United States is entitled to priority in payment from the assets of Westmoreland.

Upon motion by the United States for the appointment of a receiver, the district court found as a fact that Westmoreland was insolvent, appointed a receiver, and ordered that said receiver take possession of *all* the property of Westmoreland whether real, personal or mixed (R. 164, 168–171). Westmoreland, although free to do so (*Adler* v. *Seaman*, 266 Fed. 828, 840–841 (C. A. 8), appeal dismissed, 254 U. S. 621; *Garden Homes* v. *United States*, 200 F. 2d 299, 300

(C. A. 1)), did not appeal from that order.[4] Under these circumstances it is plain that the priority statute (31 U. S. C. 191) is applicable. See, *e. g.*, *Illinois* v. *Campbell*, 329 U. S. 362, 369–370, where this Court noted the necessity of recognizing the "realities" and went on expressly to state that "in any event the record demonstrates that the debtor was insolvent at the time of the appointment of the receiver, for when its property was liquidated there was not enough to satisfy the claims of the two contesting creditors at the bar." This statement is fully applicable to the instant case. See also, *United States* v. *Texas*, 314 U. S. 480, 483–484; *United States* v. *Emory*, 314 U. S. 423, 426; *United States* v. *Butterworth Corp.*, 269 U. S. 504, 513–514.

3. Other arguments advanced by the petitioners are equally without merit.

(A) Even if there were not in fact a federal statutory lien favoring the Government in this case (*supra*, pp. 9–10; cf. Pet. 10–12), there is no need for further review by this Court with respect to state statutory liens *vis-a-vis* prior federal liens. As shown, *supra*, pp. 7–8, this Court has recently and repeatedly handed down decisions or bare rulings consistently upholding the priority of the federal liens.

(B) There is no conflict with *United States* v. *Ansonia Brass Etc. Co.*, 218 U. S. 452. (Cf. Pet. 12–13.) Indeed, analysis of that case supports the ruling of

[4] Indeed, in its Motion to Stay Order for Sale filed in the Court of Appeals on or about January 21, 1956, Westmoreland stated that it was "not financially able to supersede the decree of foreclosure entered herein, *all its property and assets being in the hands of the receiver*." (Emphasis added.)

the Court of Appeals in the instant case.[5] In this connection, it should be noted that petitioners' quotation (Pet. 13) from a letter from special counsel for the Government, Harry E. Meek, Esq., is grossly misleading. Prior to the excerpt appearing in the petition (p. 13), Mr. Meek had stated flatly (Supp. R. 11–12): "Under our Arkansas Statute where a mortgage is given to secure a loan to finance the construction of an improvement, *the mortgage takes priority over any statutory liens created in connection with the construction of such improvement* [citation

[5] In the *Ansonia* case, as to the contract for the construction of the dredge Berryiiard [which provided that the Government should make partial payments to the contractor at various stages in the construction of the vessel and that "The parts paid for under the system of partial payments above specified shall become thereby the sole property of the United States" (218 U. S. at pp. 466–467)], this Court held that the contractor's title had been divested during the process of construction and that laborers and materialmen could no longer assert the liens created by State law (218 U. S. at pp. 467–472; *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U. S. 24, 32). This holding has been followed in several cases. *In re Read-York*, 152 F. 2d 313, 316 (C. A. 7); *In re American Boiler Works*, 220 F. 2d 319 (C. A. 3); *Thompson Mach. Works Co.* v. *Lake Tahoe Marine Sup. Co.*, 135 F. Supp. 913, 914–915 (N. D. Cal.).

The *Ansonia* case also involved two other shipbuilding contracts for the revenue cutter Mohawk and the cruiser Galveston. This Court held that local liens for labor and materials had priority for lack of expressed intent that the federal liens should be superior. But as spelled out *infra*, pp. 12–13, in the instant case the intention of the Government could hardly be plainer that its lien was to be paramount to all other liens upon all the assets (R. 30, 38), even to the extent of specifically providing that the Government's lien "will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien" (R. 51).

omitted]." (Emphasis added.) He then goes on to make clear that out of an abundance of caution—so as not "to rely 100% on this statute" (Supp. R. 12)—he is suggesting the advisability of certain precautions, using the language quoted by the petitioners.

Although the petition (p. 13) alleges that "* * * it is clear that the Government did not provide for a lien that would be superior to the lien of the Petitioners * * *", it is submitted that the Government's priority could not be stated with any greater clarity. Thus, as security for the Government's advances, the contract with Westmoreland provided that the Government was to be furnished "with *unencumbered* and *unqualified* mortgages covering the new facilities" as well as all mining properties then owned by Westmoreland, and that "*The Government shall have a lien paramount to all other liens* upon the credit balance in the special account or accounts in which the advance payments may be deposited, upon materials produced by you from the facilities, and *upon all other assets*" (R. 30). With respect to the priority of the Government's lien, the Real Estate and Chattel Mortgage expressly recited that it constituted "*a first lien on the mortgaged property*" (R. 38) and, as noted *supra*, p. 4, the Supplemental Mortgage provided (R. 51) that "it is understood * * * that the lien of the Mortgagee * * * *will take priority over the lien of any mechanic, materialman or laborer or any other statutory lien.*" (Emphasis added.)

(C) Contrary to petitioners' contention (Pet. 13–15), the case of *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, is completely irrelevant here. The Government's lien, attaching at the time of transfer

of title, was prior in time to the liens of petitioners as to each item of material furnished for the Westmoreland project. Thus, when title to the various materials became vested in Westmoreland they were not burdened with mechanics' or materialmen's liens, and reliance by petitioners, and the district court (R. 214), upon such authorities as *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 19–24, is clearly misplaced. In the *Bear Lake* case the work giving rise to the mechanics' liens was performed prior to the time at which the mortgagor could have acquired title.

Nor does petitioners' reference to the "equitable issues" (Pet. 14) have merit. As the Court of Appeals took occasion to point out (Pet. A12):

> The Government's mortgages were executed and recorded before any labor or material was furnished by any of the appellees [petitioners]. Consequently, at the time appellees entered into contracts with Westmoreland for labor and materials, they had constructive notice of the terms of the Government's mortgages. This fact may not be of any particular significance in the determination of this case, but it is an answer to the equitable claims of the appellees.[6]
> * * * *

The Court of Appeals went on to say (Pet. A12):

> The validity of the Government's mortgages in all respects has been confirmed by the judg-

[6] Moreover, the petitioners could readily have protected themselves by the exercise of normal business precautions. Particularly in dealing with a new company which was doing business largely on borrowed funds, petitioners might well have utilized conditional sales contracts or have required a bond of Westmoreland.

ment that has been entered. The Government, by virtue of a valid contract, authorized by the Constitution and statutes of the United States, bargained for and obtained a paramount lien upon Westmoreland's property. We can see no reason why the Government should not be in as good a position under a valid contractual lien as it would be under a lien created by statute.

(D) Entirely without merit is the attempt (Pet. 15–18) to invoke the "rules of decision" section of the United States Code (28 U. S. C. 1652). As has been shown (*supra*, p. 7), this Court has repeatedly made it clear that Government contracts "or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U. S. 174, 183. Thus, rather than the Court of Appeals having "overlooked" the provisions of 28 U. S. C. 1652 as indicated in the petition (p. 15), that court was simply recognizing the law as repeatedly laid down by this Court (see cases cited *supra*, pp. 7–8).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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